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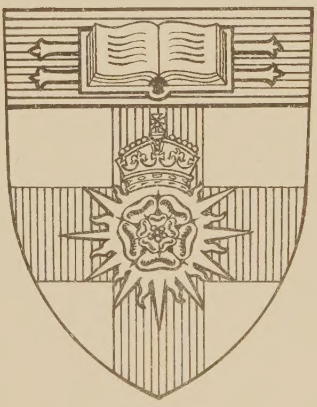

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THE

# LAW REPORTS.

## Scotch and Divorce Appeal Cases

BEFORE THE

## HOUSE OF LORDS.

REPORTED BY J. F. MACQUEEN, QUEEN'S COUNSEL.

VOL. I.

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# Appeal Cases

BEFORE

# THE HOUSE OF LORDS.

## SCOTCH AND DIVORCE APPEALS.

### JACK, Appellant; ISDALE, Respondent.(1)

1866
Feb. 12.

*Scotch Poor Law—Relief of able-bodied persons.*

Able-bodied persons are absolutely excluded from relief out of funds raised by assessment for relief of the poor under the 8 & 9 Vict. c. 83.

The Poor Law Boards of *Scotland* have no discretionary power to grant relief to able-bodied persons, although those persons may be ready and willing to work, and are in destitution simply from the want of employment.

The right to grant and the right to receive relief must co-exist, and are correlative.

THIS case (one of great social importance) divided the learned Judges of the Court of Session in *Scotland*—seven of them having voted for the decision under appeal, and six against it—the minority including the high name of the Lord President, whose mind had been for more than twenty years applied to the subject, and who was said to have framed the statute, passed in 1845, which had generated the litigation.

The sole question was whether, under the 8 & 9 Vict. c. 83, intituled "An Act for the amendment and better administration of the laws relating to the relief of the poor in *Scotland*," parochial boards had a discretionary power to apply funds raised by statutory assessment to the relief, either permanent or occasional, of persons who, being able-bodied, were in destitution or poverty merely from

(1) Reported in the Court of Session Cases, 3rd Series. Vol. ii. p. 978.

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JACK
v.
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the want of employment. This question the Court of Session, by the narrow majority of one vote, had decided in the negative.

It was agreed on both sides that the question turned on the 68th section of the Act, which section is in the following words:—"That all assessments imposed and levied for the relief of the poor shall extend and be applicable to the relief of occasional as well as permanent poor: provided always, that nothing herein contained shall be held to confer a right to demand relief on able-bodied persons out of employment."

The *Lord Advocate* of *Scotland* (1), and Mr. *Rolt*, Q.C., argued that by the old Scottish statutes the poor were divided into two classes—those who were willing to work but were not able, and those who were able to work but not willing. Besides the funds raised by assessment, there were funds the result of charitable collections at the church doors; and it is a remarkable fact, that those voluntary collections were in ancient times sufficient; so that compulsory assessments were but little resorted to. Church-door collections were made the subject of a twofold distribution; one moiety going to the relief of the permanent poor, the other to the relief of the occasional poor—the permanent poor being the only class who were legally and absolutely entitled to relief. For with respect to occasional poor, there was this discrimination, namely, that they could not demand, although they might receive, relief at the discretion of the administrators. The occasional poor comprehended persons disabled by sickness or by want of work. Mr. *Monypenny* in his treatise on the Poor Law of *Scotland*, and Sir *Henry Moncreiff*, in his Life of *Erskine*, describe the ancient practice.

[LORD CHELMSFORD:—You say the fund was divisible among two classes, one entitled, and another not entitled, to relief.]

That is our contention. The report made to Parliament in 1836 by the General Assembly of the Church of *Scotland*, shewed that the phrase "occasional poor" embraced able-bodied men suffering from a depression of trade and consequent want of employment. Then we have the Act of 1845, which must be construed with reference to the state of things and the understanding at the time

(1) Mr. *Moncreiff*.

of its passing. The 68th section gives the occasional poor the same right to relief as that which is given to the permanent poor. The proviso, indeed, declares that the able-bodied shall not be entitled to *demand* relief; but although not entitled to demand relief, they are legitimate objects of discretionary relief. In *M'William* v. *Adams* (1), the Court of Session and this House held that able-bodied men had no right to demand relief; but Lord *Moncreiff*, Lord President *Boyle*, and Lord *Jeffrey* said that the right to relief was one thing, and the right to give relief was another and a very different thing. The practice in conformity with this construction has produced great public advantage in seasons of distress, and we submit that it is sanctioned by a legitimate construction of the statute (2).

(1) 1 Macq. 120.

(2) The following were remarks of the Lord President agreeing with the minority in the Court below: "I think that an able-bodied person has no right to insist on relief; but I am of opinion that it is competent for the Parochial Board to grant relief when necessity arises—when they see a fit case for it. The proviso of the 68th section enacts, 'that nothing herein contained shall confer a right to demand relief on able-bodied persons out of employment.' That is to say, that the occasional poor who are able-bodied, and who had no right formerly to demand relief, shall not have the right to demand relief in future. But they are not excepted from the class of occasional poor, who are now to get relief; and the only difference between them is that the right of demand does not exist in the case of the able-bodied occasional poor. That is my reading of this statute. It is not a reading which I have taken up suddenly. It so happened that, soon after this statute was passed, I had occasion to turn my attention particularly to this matter, in conjunction with the late Lord *Rutherfurd*, and we considered it very deliberately, and we arrived at the conclusion which I am now stating. That was soon after the passing of the Act. It is a view of the Act which was incidentally recognised by Lord *Moncreiff* and by other Judges in the discussions as to the right of the able-bodied poor to demand relief. The opinion which I have alluded to as having been expressed by Lord *Rutherfurd* and myself at an early period after the introduction of this statute, was referred to in the annual report of the Board of Supervision, and was promulgated in the different parishes, and from that day down to a recent period it has been acted upon throughout the whole period of the administration of this *Poor-Law Act* without any evil consequences. On the contrary, it has been most successful, for during that period the state of some portions of the country on account of agricultural distress, and of other portions of the country on account of manufacturing distress, has been such that it was found necessary to resort to that mode of relief; and by acting on the view of this statute to which I have referred, temporary relief was given to destitute able-bodied persons out of the funds for relief of the poor without applying to Parliament

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The Respondent's argument, as stated in his printed case (for his counsel, Mr. *Anderson*, Q.C., and Mr. *Neish*, were not called upon to address the House), was, that no such discretionary authority as that contended for by the Appellant existed before the statute, and since the statute such power assuredly did not exist, for the proviso of the 68th section excluded it in terms which no ingenuity could get over. The case of *M'William* v. *Adam* (1) had already settled the question now raised. The decision was one by this House, which their Lordships were not likely to disregard.

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for extraordinary aid, as we find was necessary for *England*, and this was done without any evil consequences. Therefore I rest my opinion on the result of experience, noton speculation I regret that the expressions in the statute are not so explicit as to satisfy the majority of the Court that the interpretation I am putting upon it is the sound one."

(1) 1 Macq. 120. The report of the General Assembly of the Church of *Scotland* made to Parliament in 1836, stated that the Scotch system of Poor Laws, introduced by the Act of 1579, c. 74, was borrowed from the English statute, 14 Eliz. c. 5. But in *England* provision was made not only for the "impotent poor," but also for those who, though able-bodied, were out of employment and consequently destitute. In *Scotland*, on the contrary, a legal right in the able-bodied was never acknowledged. In *M'William* v. *Adam*, 1 Macq. 121, Lord *Brougham* said that it was remarkable how closely the provisions of the English and the Scotch Acts resembled each other. "The 22nd and 24th sections of the English Act are almost copied. The 23rd, that for setting to work the able-bodied, is wholly omitted. It is difficult to avoid the inference that the omission was designed on the part of the Scotch Parliament." His Lordship continued: "There is the greatest difference between relieving all impotent poor, and relieving all able-bodied persons who cannot find work; and there is no absurdity in supposing that the Legislature intended to exclude the latter class. The relieving officer may easily discern whether an applicant is disabled by infirmity. But to ascertain whether he is unable to find work, and whether the inability does not arise from his own fault, may be very difficult. The construction, therefore, that the able-bodied are excluded from relief imputes no inconsistency to the law-giver; it rests, on the contrary, upon a solid and intelligible distinction." The remarks of Lord *Brougham* hold good in individual cases. But when there is a general and notorious calamity, then the inability to grant relief and the statutory necessity of withholding it become frightful to contemplate. The contrary practice, though illegal, has worked well in *Scotland*. For what says Lord *Ardmillan*, one of the minority below? He says: "I regret that the question has been raised; because during more than one season of great distress in particular classes of the community, the discretionary power challenged in this case has been of the utmost public advantage, and has warded off results which might have been deplorable." —*Third Series of the Scotch Reports*, vol. ii, p. 1003.

THE LORD CHANCELLOR (1):—

My Lords, I think the question turns, not partly, but wholly, upon this single Act of Parliament, the 8 & 9 Vict. c. 83; and the only legitimate purpose for which we can refer to what preceded it, is to ascertain the meaning of the words "permanent and occasional poor," occurring in the 68th section. This was the way the *Lord Advocate* very properly put the matter; and it was only fair to cite the reported cases and such evidence as could be furnished, to shew that under the head "occasional poor" were included persons who were not permanently disabled, and therefore not placed upon the permanent roll to receive relief, but persons who were, from temporary illness and other causes, in a state of destitution, and objects of charity. And I take it, according to what has been pressed so much by Mr. *Rolt*, that, under the phrase "occasional poor," would be included persons who are in destitution because, though able-bodied, they cannot get work.

But what has the statute said upon that subject? The 68th section says that, "after the passing of this Act, all assessments imposed and levied for the relief of the poor shall extend and be applicable to the relief of occasional as well as permanent poor." If the clause had stopped there (supposing that the *Lord Advocate* and Mr. *Rolt* are right in their contention), it would have entitled an able-bodied person to obtain relief. But the clause does not stop there; it goes on to say, "provided always, that nothing herein contained shall be held to confer a right to demand relief on able-bodied persons out of employment."

It has been already decided almost unanimously in the Court of Session (2) (and the decision has been affirmed after great deliberation in this House), that no able-bodied person, though he might come under the description of occasional poor, has any right to demand relief. But then it is said the person does not *demand* relief in this case; or, if he does, it is not because he demands it that it is given to him. The Appellant's argument is that, although he could not have *demanded* relief, the administrators of this fund can competently give it to him whether he demands it or not. That argument appears to me

(1) Lord *Cranworth*. (2) *M'William* v. *Adams*, 1 Macq. 120.

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to be absolutely inconsistent with the notion of a fund levied for a certain special purpose, defined, as that purpose is in the 33rd section, which is that "it shall be lawful for the parochial board," at any meeting to be called for the purpose, "to resolve that the funds requisite for the relief of the poor persons entitled to relief" shall be raised by assessment.

Now, my Lords, is this a person entitled to relief?—Clearly not, unless he is entitled to demand relief. I am unable to distinguish, or to see any difference in principle, between being entitled to relief and being entitled to demand relief. The whole argument rests upon the very subtle distinction that, in that last line of the 68th clause, the words are, "that nothing herein contained shall be held to confer a right to *demand* relief," instead of "to relief." Suppose the words had been merely "a right to relief," there would not have been a shadow of foundation for the Appellant's argument. But it appears to me that that variation in the language makes no real difference; and although it was not actually the point decided in this House in the case of *Adams* and *M'William*, it is impossible not to see that both Lord *Brougham* and Lord *Truro* thought that the right to give and to receive relief were correlative; that if there was no right to demand, there was none to give relief. (1) It cannot be that where a fund has been raised for a

(1) The following were the remarks of the Lord Justice Clerk, agreeing with the majority in the Court below:—

"I am unable to construe the Act 8 & 9 Vict. c. 83, in any other sense than that which was adopted in the judgment of this Court and of the House of Lords in *Adams* v. *M'William*.

"The respondent reads the 68th section of the statute as authorizing and empowering parochial boards to apply funds raised by assessment to relief of the able-bodied out of employment, but without giving these persons any legal right to relief. I think, if there had been any intention to introduce so serious and radical a change into the Scottish poor laws, it would have been enacted in express terms, and not left to an obscure and doubtful implication. But I am also quite unable to understand an application of funds authorized by statute for a beneficial public object, which does not create a corresponding legal right in the person intended to be benefited to claim the benefit, if it be improperly withheld from him.

"The more natural and obvious construction is, that the enactment of the 68th section was intended for the benefit of that class of occasional poor who are for the time reduced by disease, bodily or mental, below the condition of being able-bodied (and who were under the older statutes proper objects of parochial relief), and that the proviso (in harmony with the older laws) excludes the able-bodied absolutely from the application of this enactment. Such was Lord *Brougham's* opinion in *Adams* v. *M'William*.

special purpose defined in an Act of Parliament and given into the hands of the persons whose duty it is to carry the Act into execution, it is open to them to say, "we think that you are not within the class of persons defined in the Act; but we think you are a proper object of relief, and therefore we shall give it to you, although we are not authorized by the Act to do so."

It is not unimportant to observe, that when a discretion was intended to be given for a purpose very similar to this, it is given in the 67th section. It is seen that it might be very convenient that the administrators should have the power to subscribe to hospitals, or objects of that nature, and therefore a discretion is expressly given to them in that 67th section (1). That seems to exclude the notion that they could have had any discretion if it had not been so conferred upon them.

My Lords, in common, I believe, with my noble and learned friends, I do not in general like to decide a case, however strong

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'It is,' he said, 'a provision in the section extending the enactments to occasional relief, and to prevent the mere want of employment from bringing persons within the class of those entitled to such relief, *the proviso in terms excludes them from whatever in the enactment is given.*'"—1 Macq. 132.

The language of Lord *Truro*, in like manner, makes it very clear that he considered the power of the administrators to give relief out of the rates, and the legal right to demand a participation in the rates, to be commensurate, and that a voluntary application of the rates by the parochial board to relieve able-bodied persons could just as little be sustained as a demand of right by the able-bodied to be relieved out of the rates. He says, "The rate in which the Appellant claims to participate was made under the authority of this Act alone. The Act *directs how this new statutable rate shall be applied*, and declares in effect that no able-bodied person shall have any right to claim under the Act to be included in the list of persons entitled to participate in the rate." "To allow the rate made under this Act *to be applied to the relief of a list of persons which included the names of able-bodied paupers, would certainly be inconsistent with this statute.*"—*Ib.* 153, 154. Again, in the case of *Lindsay* v. *M'Tear*, decided on the same day with *Adams* v. *M'William*, the same noble and learned Lord says, "The House is bound to declare, whether the overseers" (meaning, of course, the parochial board) "*are authorized by law to apply* the rate in question to the relief of these individuals, and I think that *by law they are not so authorized*, and that the children's rights and claims are dependent on those of the parents."

(1) The words of the 67th section are, "It shall be lawful for the parochial board to contribute such sums as to them may seem reasonable and expedient from the funds raised for the relief of the poor to any public hospital," &c.

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my opinion may be, until I have heard it all out. It may be said that this reluctance ought to be especially manifested in a case like the present, where there has been a minority in the Court below so numerous that the division, we may say, is nearly evenly balanced. But the question turning, as it appears to me to do, not upon any elaborate examination of old Acts of Parliament, but simply upon the construction of two or three clauses in this recent statute, and being, for my part, utterly unable to see any distinction in principle between this case and the case decided in your Lordships' House fourteen years ago (1), I think it is unnecessary to occupy your Lordships' time any further with the consideration of it, and therefore, without any disrespect to the minority of the learned Judges of the Court of Session, I shall move that this appeal be dismissed.

LORD CHELMSFORD:—

My Lords, I entirely agree with my noble and learned friend on the Woolsack; and if it were not for the difference of opinion amongst the learned Judges of the Court of Session, I should have thought that there was very little difficulty in the case.

Before the 8 & 9 Vict. c. 83, the relief of the poor in *Scotland* was provided for partly by assessment, and partly by collections at the church doors. A moiety of the collections at the church doors was blended with the assessments, and administered for the relief of the permanent poor. The other moiety, after payment of certain expenses by the Kirk Session, was distributed by them for the relief of occasional poor, and amongst these, able-bodied persons out of employment were generally included.

This being the state of things, the Act of the 8 & 9 Vict. was passed, and the 54th section provides that the whole of the church collections shall "belong to and be at the disposal of the Kirk Session of each parish." So that after this enactment there was no longer a moiety of the collections at the church doors to be blended with the assessment for the relief of the permanent poor.

A new parochial board was established, and that parochial board

(1) *M'William* v. *Adams*, 1 Macq. 120.

was, in the first place, by the 32nd section, to make up every year "a roll of the poor persons claiming, and by law entitled to, relief from the parish or combination, and of the amount of relief given, or to be given, to each of such persons." Of course this was a roll which applied merely to the permanent poor, because those were the only persons who were ascertained at the time *of its being made up*. Then the 33rd section provides, that it "shall be lawful for the parochial board to resolve that the funds requisite for the relief of the poor persons entitled to relief from the parish or combination, including the expenses connected with the management and administration thereof, shall be raised by assessment. It is quite clear, from the words of this section, that this assessment was to be applied to the persons, and solely to the persons, who were entitled to relief from the parish. Therefore, if nothing more had been said by the Legislature, the occasional poor would not have been included amongst the persons who were to be relieved out of this assessment. But it was the intention of the Legislature that a certain class of the occasional poor should have relief (not that they should be entitled to relief) out of this assessment. Accordingly, the 68th section, upon which the whole question turns, provides—not that the occasional poor shall be entitled to relief out of this fund—but that "all assessments imposed and levied for the relief of the poor shall extend and be applicable to the relief of occasional as well as permanent poor."

Therefore, this enactment gave the parochial board a power to administer relief to occasional poor out of those funds which were originally to be an assessment for persons who were entitled to relief. But then, inasmuch as able-bodied persons out of employment had been treated as occasional poor, if nothing more had been said, they would have been included within this prior part of the enactment in the 68th section; and so, to guard against this construction, the Legislature introduced a proviso to this effect—"That nothing herein contained shall be held to confer a right to demand relief on able-bodied persons out of employment."

Now, taking the few sections of the Act which I have brought to your Lordships' attention into consideration, what can be more clear than this, that it was the intention of the Legislature that

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able-bodied persons should not have relief out of this particular fund, which was an assessment raised for the relief of persons entitled to relief, and was to be extended only to occasional poor by the provisions of the 68th section? The matter appears to me to be so perfectly clear that I cannot hesitate for a moment to concur with my noble and learned friend on the Woolsack, that the appeal should be dismissed.

LORD KINGSDOWN:—

I entirely concur with my noble and learned friends.

Mr. *Anderson*:—My Lords, I am instructed by the Respondents to say that they do not ask for any expenses in this case.

Decree below affirmed, but without costs.

Solicitors for the Appellant: Messrs. *Martin & Leslie.*
Solicitor for the Respondent: Mr. *W. Robertson.*

## WELLER *et al*, APPELLANTS; KER *et al*, RESPONDENTS.

1866
March 1, 2.

*Power coupled with a duty.*

When a power, coupled with a duty, is conferred upon trustees, to be executed by them at a fixed period, and after they have come to a judgment as to the conduct of the individual to be affected, they cannot divest themselves of the power, or execute it until the time appointed; nor can they enter into any anterior compact respecting it.

The fact that the individual to be affected by the execution of the power (a youth of twenty-two) married three years before the time appointed for such execution; the fact that the trustees formally approved of the marriage, and were made aware of the settlement thereon, including a provision out of the trust estate for the intended wife; and the fact, moreover, that they gave no caution, or warning, that they might ultimately be obliged to defeat it;—all these facts made no difference in the result; for it was held to be the duty of the trustees (the husband having, in their judgment, subsequently misconducted himself) to execute the power so as to restrict him to a life-interest, although the effect was to defeat the provision for the wife, as well as other claims founded on a confident expectation that the marriage settlement would not be disturbed.

Per the LORD CHANCELLOR:—Did the trustees, by consenting to the marriage and (as I think I may assume) by consenting to the settlement, deprive themselves of this power? My clear opinion is that they did not.

Per LORD CHELMSFORD:—All parties knew, or ought to have known, that the provisions of the settlement must depend on the conduct of the son.

BY a testamentary trust settlement dated the 23rd of September, 1839, *Robert Ker*, of *Argrennan*, in the county of *Kirkcudbright*, directed trustees to hold his estate upon trust for the use and behoof of his eldest son *Robert* and the heirs of his body, whom failing, for the use and behoof of his second and other sons in succession; and he directed his trustees, upon his said eldest son attaining the age of majority, to convey to him the said estate; but declaring that in case his said son should marry or otherwise conduct himself so as not to merit the approbation of his said trustees, the provisions made in his favour should only belong to him in life-rent, and to his issue or heirs in fee.

By a codicil dated the 26th January, 1847, the testator declared that the trustees should not convey to his said eldest son his said estate of *Argrennan* on his attaining the age of twenty-one years,

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but that the said conveyance should be postponed till he should attain the age of twenty-five years.

The testator died in 1854. His son attained the age of twenty-one on the 22nd of July, 1857. On the 21st of September, 1858, he married Miss *Elizabeth Hester Rosetta Macalpin*, daughter of Colonel *Macalpin*, of *Windsor*, in the county of *Mayo*.

On the occasion of this marriage, two distinct settlements were executed; one in the English, and the other in the Scotch, form. The young lady's fortune was £15,000.

The question turned exclusively on the Scotch marriage settlement, by which the *Argrennan* estate was settled on the intended husband "in life-rent and on his heirs in fee;" (1)—thereby purporting to give him in effect the fee absolutely; and he became bound, on attaining the age of twenty-five, to charge it with a jointure of £400 per annum to his intended wife. This, of course, he could only have done effectually, on the footing that he should at twenty-five acquire a dominion, which undoubtedly the conduct of the trustees induced the contracting parties and others, at the time of the marriage, to anticipate.

The intended marriage was notified to the trustees, who expressed their approbation of it, and entered and signed a memorandum to that effect in their minute-book. A correspondence had previously taken place between the solicitor of the trustees (who was also solicitor of the intended husband) and the solicitors of Miss *Macalpin*. The solicitors of Miss *Macalpin* required the trustees to become parties to the settlement, of which a draft was laid before them, or, at all events, before their solicitor. They refused to become parties to it; but with reference to the whole negotiation, the Lord Ordinary, on the case coming before him, expressed "his regret that they should have so proceeded as not unnaturally to foster an idea, that the husband at the age of twenty-five would undoubtedly be Fiar (2) of *Argrennan*." Between the marriage and his attaining the age of twenty-five, the husband unfortunately so conducted himself as, in the opinion of the trustees, to deserve and justify their disapprobation. They entered a formal memorandum to this effect in their Minute Book on the

(1) See the third series of the Court of Session Cases, vol. ii. p. 372.
(2) That is to say, absolute owner.

18th of June, 1861. He had contracted sundry debts; and claims were put in by his creditors, whose hopes of satisfaction depended on his getting the fee of the *Argrennan* estate.

On the 2nd of July, 1861, he attained the full age of twenty-five (1). On the following day, to use the language of the pleadings, "in consequence of conflicting demands, the settlement of which could only be accomplished by judicial decision," the trustees instituted the present suit, to obtain the direction of the Court as to the course they should pursue.

The Lord Ordinary, relying upon and citing the memorandum of the 18th of June, 1861, on the 13th of February, 1863, decided that "the said *Robert Ker*, junior, or any one claiming as his assignee, could not demand from the trustees any more extensive conveyance of the estate of *Argrennan* than a conveyance *to him in life-rent*." This Interlocutor was submitted to the review of the first division of the Court of Session, who adhered to it on the 19th of December, 1863. Hence the present appeal to the House.

The *Attorney-General*, the *Lord Advocate*, and Mr. *Druce*, for the Appellants, contended, in the first place, that the power, by the words of the testamentary trust settlement, was to be executed on the son arriving at majority, and was not to be postponed till his age of twenty-five. In other words, they urged that the codicil did not apply to the eldest son. Secondly, and mainly, they insisted that inasmuch as the trustees had formally approved of the marriage which had been entered into in the full confidence that they would ultimately convey an absolute fee to the son, they were not at liberty afterwards to change their mind and restrict him to a life-rent.

Mr. *Rolt*, Q.C., and Mr. *Anderson*, Q.C., for the Respondents, were not called upon to address the House.

The following opinions were delivered by the Law Peers:—

THE LORD CHANCELLOR:—

The testator died in 1854. His eldest son, *Robert Ker*, attained majority in 1857, and of course did not attain his age of twenty-

(1) The judgment as to his conduct would appear to have been come to a fortnight earlier.

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five years until four years later—namely, in 1861. In the mean time, between his attaining majority and his attaining the age of twenty-five years, he married in 1858; and, for the present purpose I shall assume, that having married, as he certainly did, with the consent of the trustees, those trustees also approved of the settlements then made.

The trustees having, subsequently to the date of the marriage, and before *Robert Ker* attained the age of twenty-five, been dissatisfied with his conduct, the question now is, have they the power to confine his interest to a life-rent only? The Appellants' counsel urged that the power extended only to each child during his minority; for that, although by the codicil, the age of majority, so to speak, was altered from twenty-one to twenty-five, yet the power that was given in the trust deed to endure only during the minority, was not extended by the codicil to the time at which the estate was to be conveyed: namely, twenty-five instead of twenty-one.

If, indeed, the power had been a power declared to endure only till the time when the child should attain the age of twenty-one, there might have been great force in the argument; but this is a power which endures till it is put an end to, not by the child attaining the age of twenty-one, but by an act, which by the codicil takes place at a later period. Therefore, it seems to follow that this power was, according to the true construction of the will and codicil taken together, to endure as long as the property continued in the hands of the trustees. That being so, did the trustees, by consenting to the marriage, and, as I think I may assume for the purpose of this argument, by consenting to the settlement, deprive themselves of the power?

Now undoubtedly, by the law of *England*, I should say it was clear that they could not divest themselves of this power. I hope I shall not be understood as meaning to say that there is any difference between the law of *England* and the law of *Scotland* in this respect. I do not believe there is; but that question has not been fully canvassed, and for the purpose of this argument I do not mean to embarrass myself with it. But it seems a very strange proposition, that if a testator gives power to trustees, evidently to

be exercised only with reference to the interests of his children, or those for whom he is providing, the trustees should be able to say, "We give up that power;" a power which was committed to them, not for their own benefit, but for the benefit of others. But whether they had the power of divesting themselves or not, my clear opinion is, they never did divest themselves of that power.

It appears to me that on these grounds I may advise your Lordships to concur with the decision of the Court of Session, and to affirm the Interlocutor which is appealed against.

LORD CHELMSFORD:—

I entirely agree with the opinion of the Lord Ordinary, and of the majority of the Judges of the Court below. The time at which the trustees were required to convey was the time at which they were to determine whether the heir should have the fee, or merely a life-rent; and when the period for making the conveyance was deferred, it necessarily deferred to the same period the judgment as to the kind of conveyance which was then to be made.

It was evidently the testator's intention that the trustees should exercise their judgment upon a review of the conduct of the son at the time when the estate was to be conveyed to him. Before that period it is clear that they could not have deprived themselves of the exercise of future judgment by giving him the fee; and there seems to be no reason why they should have been able to anticipate the time of passing judgment upon his conduct by restricting him to a life-rent at an earlier period than his age of twenty-five. It was possible that before twenty-five he might have conducted himself so as to excite the disapprobation of the trustees, but that at that age he might have redeemed himself in their estimation by subsequent good conduct. There was apparently no intention that the heir should either have the fee conveyed to him, or that he should be deprived of it by any judgment of the trustees before the period when they were bound to make the conveyance. But the more important questions are, whether it was competent for the trustees to undertake that their power should not be exercised so as to prejudice the rights and interests created by the marriage settlement; and if this was within their competency, whether they have, in fact, so undertaken.

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It appears to me that the trustees could not either abandon or fetter the exercise of the power entrusted to them. It was a power coupled with a duty of a most important character. It was evidently intended that it should be retained and freely exercised down to the time when they were called upon to convey the estate. But even assuming that the trustees might have bound themselves not to interfere with the rights and interests created by the marriage settlement by giving their consent to it, in point of fact no such consent was ever given. That they consented to the marriage is clearly proved, and this would of course prevent their afterwards making it the ground of objection to the conveyance of the fee to the heir. But it is not correct to say that the consent to the marriage carried with it a consent to the marriage settlement. The trustees' names were designedly omitted as consenting parties to the settlement. But if they had consented to the settlement, it would, in my judgment, have made no difference. All parties knew, or ought to have known, that the provisions of the settlement could only be contingent and conditional, depending upon the conduct of the son till his age of twenty-five.

LORD KINGSDOWN:—

I entirely agree with my noble and learned friends.

Interlocutors affirmed, and the appeal dismissed with costs.

Solicitors for the Appellants: *Domville, Lawrence, & Graham.*
Solicitors for the Respondents: *Dodds & Hendry.*

THE COMMISSIONERS OF THE LEITH HARBOUR AND DOCKS . . . . } APPELLANTS.

THE INSPECTOR OF THE POOR *et al* . RESPONDENTS (1).

1866
*March* 8, 12.

*Poor-rate—Immunity of the Crown—Liability of Harbours and Docks—General Liability—*8 & 9 *Vict. c.* 83; 23 & 24 *Vict. c.* 48.

The statutes which authorize assessments for relief of the poor are silent as to the Crown. Hence the Crown is subject to no poor-rate. To this immunity a wide signification is ascribed; for not only are the palaces of which Her Majesty is in actual occupation deemed free from assessment, but even the House of Lords is held to be exempt, on the ground that it is regal.

So likewise Government offices, as the Post-office, the Horse Guards, and the Admiralty, escape this impost, simply because they are in the service of the Crown.

In the days of Lord *Mansfield*, Lord *Kenyon*, Lord *Ellenborough*, and Lord *Tenterden*, an opinion prevailed that property held for public purposes (though unconnected with the Crown, the State, or the Government) was exempt from poor-rates. This opinion was shaken by Lord *Denman*, and substantially overturned by Lord *Campbell;* but it was not finally extinguished till the judgments of the House of Lords pronounced last session in the English case of the *Mersey Docks* (2), and in the Scotch case of the *Clyde Navigation Trustees* v. *Adamson* (3).

Per the LORD CHANCELLOR (4): We are all agreed that the principle of the *Mersey Docks Case* and that of the *Clyde Navigation Trustees* v. *Adamson* are the same, and not to be distinguished.

Adjudged by the House that the *Leith* Commissioners were liable to be assessed for the relief of the poor in respect of their docks and harbours

(1) Reported in the 3rd series of the Court of Session Cases, vol. ii. p. 1234.

(2) See the *Mersey Docks Case*, decided on the 22nd of June, 1865, which will speedily appear in "Mr. *Clark's* House of Lords Reports." And see likewise the reports of "The Law Journal," "The Jurist," "The Law Times," "The Weekly Reporter," and "The New Reports," all of which give accounts of the *Mersey Docks Case;* from which it appears that Trustees, as the legal occupiers of hospitals or lunatic asylums, are rateable to the poor; the real occupants being paupers sick or insane. The occupation, however, must be capable of yielding a net annual income, though it be not beneficial to the owner.

(3) 4 Macq. 931. In this case the decision of the House was that "Crown property, as well as property devoted to or made subservient to the Queen's Government, is exempt from poor-rate; but property held upon trust to create or improve docks and harbours in seaport towns, though having a public character, and though devoted to public purposes, is nevertheless subject to be rated for the relief of the poor."

(4) Lord *Cranworth*.

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COMMISSIONERS OF THE LEITH HARBOUR AND DOCKS *v.* INSPECTOR OF THE POOR.

as owners and occupiers of lands and heritages within the meaning of the statutes, not for their own use, but exclusively for the benefit of the public, there being no exemption of property held for public purposes unless held by the Crown or for the Crown.

*Res Judicata*:—

That the Court has decided against a poor-rate for one year, is no reason why it should not decide in favour of a poor-rate for another and a different year, in respect of the same property, and in a suit between the same individuals. The doctrine of *res judicata* does not apply to such a case.

THE action was brought in January, 1861, by the inspector of the poor and three owners, or occupiers, of property in the parish of *North Leith* against the above commissioners, to have it declared that they were liable to be assessed for the relief of the poor, under the 8 & 9 Vict. c. 83, in respect of "all lands, quays, harbours, wharves, docks, sheds, cranes, &c., the property of, or occupied by, them;" and that in estimating the yearly value of the said subjects, all harbour-dues, &c., and all miscellaneous dues collected by them, should be included and taken into account.

The commissioners' defence was, in the first place, *res judicata*, they averring that the very question raised in this case had been already decided in a previous suit between the same parties (1).

Secondly, the commissioners asserted that the property sought to be charged was "held by them solely and exclusively for the benefit of the public, and that the revenues were appropriated to the maintenance of the harbour, and the liquidation of debts incurred in the construction of the works."

The Lord Ordinary, on the 20th of March, 1862, found and declared in terms of the several declaratory conclusions of the summons. In other words, he decided in favour of the claim, and against the commissioners.

A reclaiming note was presented by the commissioners to the First Division of the Court of Session, who, on review, confirmed the Lord Ordinary's decision; and hence the present appeal.

The *Attorney-General*, the *Lord Advocate*, and Mr. *Anderson*, Q.C., appeared as counsel for the Appellants; and contended, in the first place, that the decision of the House of Lords in the case of the *Leith Harbour Commissioners* v. *The Inspector of the Poor* (1),

(1) See 2 Macq. 28.

pronounced in 1855, was *res judicata*, and decisive of the present appeal, which was substantially between the same parties, and with reference to the same subject matter.

Secondly, they insisted on exemption from poor-rate because here the property vested in the commissioners was held by them, not for private, but exclusively for public purposes.

In course of the argument the Lord Chancellor stated the opinion of all their Lordships to be that the principle of the decision in the case of the *Mersey Docks*, and in the case of the *Clyde Navigation Trustees* v. *Adamson*, both pronounced by the House last session, was the same and not to be distinguished. The only exemption, his Lordship added, from poor-rate was that of the Crown, to which a very extended signification had been attached, so as to include prisons and rooms at the assizes.

The several points pressed by the Appellant's learned counsel were deemed so clear against them that at the close of their remarks, the Respondents' counsel, Mr. *Rolt*, and Sir *Hugh Cairns*, were not called upon to address the House; and the following opinions were forthwith delivered by the law peers.

THE LORD CHANCELLOR:—

My Lords, the question in this appeal, though one of great importance, does not appear to me, after the examination which the matter has received at your Lordships' hands, to be one of any difficulty.

It is not a matter of surprise that the subject should have been brought more than once under discussion. Erroneous views of it have been taken by very eminent Judges from time to time. Lord *Mansfield*, Lord *Kenyon*, Lord *Ellenborough*, and Lord *Tenterden* thought that there was a distinction in respect of the rateability of property when it was not occupied by beneficial owners. That question was raised in the great case of the *Mersey Docks*, which finally came to be adjudicated upon here in the last session of Parliament; and which, after a very elaborate consideration by the Judges, as well as by your Lordships, was finally decided in favour of the rateability of all trustees or commissioners having harbours, docks, wharves, and other property of the same sort in their possession, in respect of which they levied harbour dues, tolls, or other

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sums of money. It was held that all these were liable in *England* according to the language of the statute of *Elizabeth* (1) (and there is no difference in the language of the statutes which regulate the poor-law in *Scotland*), with this single qualification, that as the Crown is not mentioned in the Poor-law Acts, the Crown is not bound; and, therefore, Her Majesty's palaces (including the building in which your Lordships are now administering justice), and other establishments which can be said to be in the occupation of the Crown, are not rateable.

But it was distinctly held that harbours, docks, rivers, and wharves, are not in the occupation of the Crown, and consequently are rateable. Therefore, upon this general principle, I think there is no doubt that the property in the present case is rateable.

I certainly thought, and I believe both my noble and learned friends thought, that the very point had been decided last session in *Adamson's Case* (2); but from the argument of the *Lord Advocate*, I was induced to look at the Journals to see what was the actual interlocutor which came by appeal before your Lordships; and it certainly does appear that some matters which were held in the *Mersey Docks Case* to be chargeable, did not form the subject of that interlocutor; and, therefore, there has not been any strict adjudication with respect to all that which is now sought to be held rateable in the present case. As it was not all included in *Adamson's Case*, it has not been finally adjudicated upon. But that which was deficient in point of adjudication in *Adamson's Case*, will now be made good by your Lordships' decision in this case. And it must be now held in *Scotland*, as in *England*, that the commissioners or trustees of docks, harbours, wharves, and everything of the sort, are liable to be rated in respect of their receipts, whatever be the purposes (other than Crown purposes) to which those receipts are to be applied.

There remains the single point of *res judicata*, which, I think, will appear to your Lordships to be more plausible than substantial. Some ten or eleven years ago the question was raised as to the liability of the commissioners of this very harbour to contri-

(1) 43 Eliz. c. 2.

(2) *Clyde Navigation Trustees* v. *Adamson*, 4 Macq. 931.

bute to the rate for the year from Whit-Sunday, 1846, to Whit-Sunday, 1847. They denied liability; and pleaded, amongst other things, that "The subjects were held by them solely and exclusively for the benefit of the public; and further, that the rates and revenues leviable being by law limited and appropriated to the maintenance and repair of the harbour, and the liquidation of the debt incurred in the construction of the works, they were not liable for the assessment."

That case, however, turned, as appears by Mr. *Macqueen's* report of it, on a totally different point (1). And the affirmance of a

(1) The Court of Session on the 19th of December, 1852, decided that the sum of £7680, appointed to be paid annually out of the revenues of the harbour and docks of *Leith*, was liable to be assessed for the poor, under the 8 & 9 Vict. c. 83, for the year from Whit-Sunday, 1846, to Whit-Sunday, 1847. The assessment amounted to £518 8*s*., for which they decreed against the commissioners of *North Leith*, and declared that they and their successors in office were liable to pay poor-rates on the said sum of £7680 from Whit-Sunday, 1847, and in all time thereafter; but reserving to the said commissioners their relief against the inspector of the poor of *South Leith*, to the extent of such portion of the said sum (if any) as might be found to be assessable to the parish of *South Leith*. Upon the appeal all that was said by the law peers was as follows:—The LORD CHANCELLOR CRANWORTH: There is no authority whatsoever in the *Poor Law Act* to rate a sum of money. In order to have made this interlocutor sustainable in point of form, it should have imposed a rate, not upon the fund, but upon the commissioners, as being the owners and occupiers of the docks. Another objection, which is quite unanswerable, is this, that here these gentlemen are rated in the parish of *North Leith* for the whole of these docks, although only a part of them is situated in that parish, and they are told you may recover such proportion, if it is improperly assessed, from the parish of *South Leith*. But a Court of justice must not thus deal with the suitors who come to it for relief. It appears to me, therefore, that both the form and the principle of this decision are entirely wrong, and therefore the course which I propose to take is simply to move your Lordships that this interlocutor be reversed, but that the judgment of the House shall be so drawn up as not to prejudice the parties with respect to any rate that may be imposed hereafter.—LORD BROUGHAM: I entirely agree. The interlocutor of the Court of Session was reversed with the following guarded declaration:—"This judgment of reversal is not to prejudice or affect any question which shall hereafter arise as to the liability of the said commissioners to be assessed for the poor, by virtue of the Act 8 & 9 Vict. c. 83, for the harbour, docks, and subjects vested in them as owners, tenants, or occupiers, as in the pleadings is mentioned. And it is further ordered that, with this declaration, the cause be remitted back to the Court of Session in Scotland, to do therein as shall be just and consistent with this declaration and judgment." The Judgment of the House was pronounced on the 6th of February, 1855.—2 Macq. 28.

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part of the decision below, so far as it was affirmed, had reference not to the general question of rateability, but solely to the payment to be made for a particular year. Care, however, was taken by the House to guard itself from expressing any opinion as to the general question of the rateability of harbours and docks. The plea of *res judicata* is just as invalid as the other objections; and I shall, therefore, move your Lordships to affirm the decision appealed from.

LORD CHELMSFORD :—

My Lords, I will not enter into the consideration of the former judgment in favour of the Appellants (1), and the effect of the declaration which accompanied it in this House, further than to say that whether the declaration is to be regarded as a reservation of the question of the liability of the commissioners to be assessed for the sum of £7680 in some other manner and form,—or a reservation of the question of their general liability for poor-rates,—it would equally leave the point open for future consideration, whether they were liable to any assessment for the relief of the poor in respect of the harbours, docks, and subjects vested in them as owners, tenants, or occupiers.

It appears to me that the argument for the Appellants has not sufficiently attended to the nature of a plea of *res judicata*. The maxim of the civil law, "*res judicata pro veritate accipitur*," applied only when the identical question, which had been once judicially decided, was again raised between the same parties—the rule laid down in the Digest, lib. xliv. t. 2, s. 3, being "*exceptionem rei judicatæ obstare, quoties eadem questio inter easdem personas revocatur.*" This plea, therefore, is exactly analogous to a plea in the English Courts of "judgment recovered;" (2) in which it is necessary, in order to make the judgment operate as an estoppel, that it should be between the same parties and upon the same subject matter coming directly in question, either in the same Court, or in another Court of co-ordinate jurisdiction.

Without considering whether the pursuers are different or substantially the same in the present and in the former action, or

(1) 2 Macq. 28.

(2) As to the plea of "Judgment recovered," see *Saunders* on Pleading and Evidence, *Lush's* 2nd ed. vol. i. pp. 257, 258, 264; vol. ii. pp. 257, 1388.

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whether the circumstances under which the question is now raised have been changed from what they were before by the Act of the 23 & 24 Vict. c. 48, it is sufficient to say that the proceeding in the present case being for a different rate from that upon which the former judgment proceeded, the cause of action is different, and the plea of *res judicata* is consequently inapplicable.

In a case to which the plea of *res judicata* properly applies, and an appeal is made to the House, its jurisdiction is not taken away by effect being given to that plea. On the contrary, it is then deciding upon the whole subject of the appeal. The only question in such a case would be whether there was a previous judgment between the same parties on the same subject matter; and that once established, there would be no possibility of going behind the judgment and examining the grounds on which it proceeded; for, as long as it remained in force and unreversed, it would be conclusive between the parties.

But I think the plea of *res judicata* cannot in this case be maintained.

LORD KINGSDOWN:—

My Lords, I quite agree with my two noble and learned friends.

*Interlocutors affirmed, and appeal dismissed with costs.*

Solicitors for the Appellants: Messrs. *Maitland & Graham.*

Solicitors for the Respondents: Messrs. *Simson & Wakeford.*

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LORD LOVAT *et al* . . . . . APPELLANTS;

AND

FRASER OF ABERTARFF *et e contra* . . . RESPONDENT.

*Heir and Executor—Costs.*

How far an executor is entitled to be relieved from costs incurred by him in resisting the demands of creditors, the testator having made his debts, "due at his death," a charge upon his real estate, and having also declared that they should "in nowise affect or diminish" his personal property.

Circumstances under which the House decided that such costs ought not to be allowed to an executor,—Lord *Kingsdown* dissenting.

Opinions of the Lord Chancellor (1), of Lord *Chelmsford*, and of Lord *Kingsdown*.

*Practice—Acquiescence.*

Where a reclaiming note from a Lord Ordinary's interlocutor to the First Division had not been insisted in, and where the interlocutor was consequently allowed to stand;—*Held*, by reason of this acquiescence, that an appeal to the House of Lords was excluded.

THE Honourable *Archibald Fraser*, being heir of entail in possession of the *Lovat* family estates in the county of *Inverness*, and also owner in fee simple of the estate of *Abertarff* in the same county, conveyed by certain instruments of entail and testamentary settlement executed in 1808 and 1812, the *Abertarff* estate to the above Respondent and the heirs male of his body; whom failing, to the above Appellant Lord *Lovat* and the other heirs of entail appointed to succeed to the *Lovat* estates; "but under burden of the settlor's debts which might be due by him at his death; which debts should in nowise affect or diminish his executry or other funds or effects."

Under these deeds the Respondent supposed and was advised that the *Abertarff* estate was his in fee simple; but the Court of Session in 1848 decided that he held it under the fetters of entail; and in 1851 he executed, by order of the Court, a deed so settling the title.

The settlor, besides being the absolute owner of *Abertarff*, was

(1) Lord *Cranworth*.

also possessed of considerable personal property, to which, upon his death in 1815, the Respondent succeeded as his general disponee and representative *in mobilibus.*

In 1851, the Respondent commenced an action against Lord *Lovat* and the other substitute heirs of entail of *Abertarff*, to have it declared that it was held under the burden of paying the settlor's debts and of relieving the executry thereof; but more particularly of a debt of £6,186 paid by the Respondent to the settlor's creditors, and £2,791, the expense of litigation incurred by the Respondent in resisting their demands.

The Lord Ordinary found that the *Abertarff* estate was liable in payment of the £6,186 and might be attached and sold in satisfaction thereof. Against this judgment a reclaiming note was presented by the Appellant to the Judges of the First Division, who on the 7th July, 1859, refused the note on the ground that "it was not insisted in." Against this decision Lord *Lovat* appealed to the House of Lords.

With respect to the £2,791 claimed for the expense of litigation, the Lord Ordinary found that the *Abertarff* estate was liable in payment thereof, subject to taxation. But this decision was recalled by the First Division, who, in lieu thereof, found that the Respondent was entitled to £331 subject to taxation, "but to no other portion of the £2,791."

The Respondent presented to the House of Lords his cross appeal against this judgment, so far as it rejected his claim of £2791; while, on the other hand, the Appellant Lord *Lovat* complained of it by his principal appeal in so far as it subjected the *Abertarff* estate to the payment of £331, by taxation reduced to £323.

The *Lord Advocate* and Mr. *Rolt*, Q.C., appeared for the Appellant Lord *Lovat.*

The *Attorney General* and Sir *Hugh Cairns*, Q.C., for the Respondent Mr. *Fraser.*

The facts of the case and the topics relied upon by counsel in the construction of the instruments are fully set forth and

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examined in the following opinions delivered by the Law Peers:—

THE LORD CHANCELLOR:—

My Lords, a deed of entail and settlement was executed on the 13th of August, 1808, by the Honourable *Archibald Fraser*, then of *Lovat* in the county of *Inverness*, whereby he conveyed and disponed his lands of *Abertarff* to the above Appellant Lord *Lovat*, whom failing, to various heirs substitute named in the deed, but under the burthen of such debts as might be due from him at his decease, which debts, however, he declared "should in nowise affect or diminish his executry or other funds or effects unless given and conveyed by him to the said Lord *Lovat* and the other substitutes above mentioned." Power was reserved to the settlor of revoking or altering the deed at any time during his life.

By another deed, bearing date the 2nd of July, 1812, the settlor, reciting the deed of 1808, and his power to revoke or alter the same, expressed his intention to exercise that power to the extent of appointing his grandson *Archibald Thomas Frederick Fraser*, the above Respondent, and the heirs male of his body, to succeed to the said property immediately after himself on failure of heirs of his body, whom failing, to the persons named in the said former deed to succeed as heirs substitute in the order therein mentioned.

The settlor died in 1815, and he did not give his executry to Lord *Lovat;* so that the debts due from him at his decease became a charge on the entailed estates.

The Respondent, the Institute named in the deed of 1812, was a minor at the death of his grandfather the settlor, and his curators or trustees disputed his obligation to execute a deed of entail, pursuant to the deeds to which I have referred; contending that he was entitled to the lands in question in fee simple.

The Appellant, Lord *Lovat*, and the other persons interested after him under the deeds of 1808 and 1812, thereupon raised an action of declarator of entail against the Respondent, insisting on their right to have a proper deed of entail executed for the purpose of carrying into effect the provisions of those deeds.

This led to a very protracted litigation, which ended in establish-

ing the liability of the Respondent to execute a deed of entail in conformity with the deeds of 1808 and 1812. And such deed was accordingly prepared under the sanction of the Court, and in February, 1851, was executed by all necessary parties. This deed contained a declaration that the settlement thereby made was under the burden of payment of all the just and lawful debts of the settlor. The Respondent thus became seised of the lands, burthened as aforesaid, to him and the heirs male of his body, whom failing, to Lord *Lovat*, and the heirs male of his body, whom failing, to the other substitutes named in the deed of 1808.

In December, 1851, the Respondent commenced the present action against Lord *Lovat* and his sons, and against the other heirs substitute named in the deed of entail, concluding that it ought to be declared that the several sums therein mentioned, making together £6186, were just and lawful debts of the settlor due at his decease, and that they had been paid by the Respondent as his general deponee and representative *in mobilibus;* and further, that it ought to be declared that the lands included in the deed of entail executed in February, 1851, were held under burthen of the payment of all the debts of the said settlor due at his decease, including these debts, and under the burthen of relieving the executry of the said *Archibald Fraser* from the payment thereof, and that the said lands might be sold therefor; and further that it might be declared that the Respondent was entitled to be relieved out of the entailed lands of the sum of £2791 1*s.* 9*d.*, as the expenses of litigation incurred by him *bonâ fide* and beneficially for the heirs of entail, and that the said lands are liable in payment thereof, and to be attached and sold therefor.

The Respondent stated in his condescendence that several of the sums making up the £6186 had been due to creditors of the deceased who claimed and raised actions against him to recover sums greatly exceeding the amount which they ultimately succeeded in establishing as due to them; and that he resisted these demands, and so litigated, not only *bonâ fide*, but also beneficially for the estate ultimately liable; but he alleged that the expenses of the litigation amounted to £2782, or, as stated in the summons,

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£2791, and which sum, therefore, he insisted was a charge on the entailed lands in addition to the £6186.

Lord *Lovat* and the other Defenders contended that the entailed lands, in the circumstances which had occurred, were not liable to bear the burden of the debts of the deceased; and so they disputed the right of the Respondent to the relief he sought, both as regarded the £6186 and the £2791.

The record having been closed, the Lord Ordinary pronounced an interlocutor on the 17th of June, 1853, finding that "by the express terms of the clause in the deed of entail, dated 8th of February, 1851, the payment of all the just and lawful debts due by the late *Archibald Fraser*, of *Lovat*, at his death, is declared to be a burden on the entailed lands, and in no wise to affect or diminish his executry, except only in the event of the executry being given and conveyed to the Defender and the other substitutes, which contingency never emerged. Finds that this deed of entail was prepared under the directions of, and has been approved by, the Court of Session, and that the insertion of the aforesaid clause was objected to by the Defender, but that his objections were repelled in this Court and in the House of Lords. Finds that there is nothing in the provisions contained in the deeds of the 15th of August, 1808, and the 2nd of July, 1812, which either according to their true meaning or legal effect, are inconsistent with the sound construction of the aforesaid clause in the deed of entail of 1851. Therefore finds and declares that the lands included in the deed of entail of 1851 are held under the burden of payment of the debts due by the deceased Honourable *Archibald Fraser*, of *Lovat*, and of relieving his executry of the same."

The Defenders being dissatisfied with the decision of the Lord Ordinary, lodged a reclaiming note to the First Division of the Court of Session; but that Court concurred with the Lord Ordinary, and adhered to his interlocutor.

By a further interlocutor, dated the 20th of November, 1855, the Lord Ordinary found and declared that the various sums specified in the first conclusion of the summons, amounting to £6186, were just and lawful debts of the deceased, and had been paid by the Respondent as general disponee and representative *in*

*mobilibus*, but he declined to make declarator that the entailed lands were liable to the payment of these debts until the pursuer should have produced certain discharges specified in the interlocutor. And as to the last conclusion of the summons, the Lord Ordinary found that the pursuer was not entitled to relief out of the entailed lands as to the said sum of £2791; and he assoilzied the Defenders from that conclusion of the summons.

The Appellants reclaimed against this interlocutor to the First Division of the Court. And as to so much of the interlocutor as relates to the last conclusion of the summons—*i.e.*, to the £2791, the sum claimed for expenses of litigation, the First Division recalled the interlocutor; but, *quoad ultra*, they adhered to it, and refused the reclaiming note, and they remitted to the Lord Ordinary to allow parties an opportunity of substantiating their respective averments as regarded the said sum of £2791.

By an interlocutor of the 8th of June, 1858, the Lord Ordinary found that the Respondent was entitled to relief in respect to the sum claimed as aforesaid for expenses of litigation, with certain specified exceptions, and subject to taxation. And by another interlocutor, of the 17th of the same month of June, he found that the discharges required by the interlocutor of the 20th of of November, 1855 had been produced; and he therefore found and declared that the lands included in the deed of entail of the 8th of February, 1851, were liable to the sum of £6186, and might be attached and sold for payment thereof.

Against these two last interlocutors the Respondent lodged a reclaiming note; and by an interlocutor of the First Division, made on the 7th of July, 1859, it was found that the reclaiming note, so far as related to the interlocutor of the 17th of June, 1858 (1), was not insisted in, and therefore they refused to recall the same; but as to the interlocutor of the 8th of June, 1858 (2), they recalled it, but found that the Respondent was entitled out of the entailed lands to a sum of £331, part of the sum of £2791 claimed for expenses of litigation, subject, however, to taxation; but was not entitled to any further part of the £2791. The result of taxation was that this sum of £331 was reduced to £323.

(1) *i.e.* The interlocutor fixing the estate with £6,186.

(2) *i.e.* The interlocutor finding the Respondent entitled to the costs of litigation.

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Both parties were dissatisfied with this result. Lord *Lovat*, and those entitled after him to the entailed lands, disputed the liability of the lands to make good the £323. On the other hand, the pursuer contended that the Court ought to have declared the whole of the £2791 (subject, if necessary, to taxation) to be a charge on the entailed lands.

Appeals to the House were presented by each party. The first appeal was by Lord *Lovat* and his sons, complaining, not only of the charge of £323 for expenses, but also of the charge of £6186 for the debts.

Your Lordships intimated in the course of the arguments of counsel, that as to the sum of £6186, you could not entertain any appeal; for as the reclaiming note lodged against the Lord Ordinary's interlocutor of the 17th of June, 1858, which had declared the entailed lands liable to the payment of that sum, was not insisted in, the parties must be taken to have acquiesced.

The question, therefore, on Lord *Lovat's* appeal, was confined to the charge of £323; while, on the other hand, the question on the Respondent's cross appeal was as to his alleged right to the entire sum incurred in litigation, namely, £2791.

The question in both appeals was substantially the same, *i.e.*, as to the proper interpretation of the clause in the deed settled by the Court of the 8th of February, 1851, declaring that the entailed lands were to be held "with and under the burden of payment of all the just and lawful debts of the settlor, due at his death; which said debts should in nowise affect or diminish his executry or other funds, property, and effects."

On the part of Lord *Lovat* and the heirs substitute of entail, it was contended that nothing is charged on the lands which was not a debt which the deceased was liable to pay in his lifetime; that the costs of litigation now sought to be added to the amount of such debts not only were not debts of the deceased, but were occasioned by unjust demands, set up after his death by persons claiming against his executor sums as due from him which were not so due.

On the other side it was insisted that the charge of "just and lawful debts due from the deceased at his death," must be taken to include all costs fairly incurred in ascertaining what those

debts really were, and, more especially, the cost of resisting excessive demands unjustly made against the executry. It is now for your Lordships to decide between these conflicting arguments.

My advice to your Lordships is in favour of Lord *Lovat*, and the parties entitled after him as heirs substitute in the entail. I do not think that any part of the sum constituting the expenses of litigation can be treated as having been charged by the settlor on the entailed lands.

The question is, in strictness, whether these expenses are so charged by the deed of the 8th of February, 1851. But as that deed recites the previous deeds of the 15th of August, 1808, and the second of July, 1812, and appears on the face of it to have been framed in order to carry into execution the purposes of those deeds, I should have been very unwilling to act on the deed of 1851 independently of the prior deeds, if there had been (which I do not think there is) any conflict between them. And I am willing to consider the subject as depending on the true effect of the deeds of 1808 and 1812, the purpose of those deeds being, as I think, effectually embodied in the deed of 1851.

The question, therefore, may be thus stated: When a testator charges his real estate with the payment of his debts in exoneration of his personalty, and when after his death a creditor sues the executor and puts him to cost in resisting so much of the demand as was unfounded, can the executor recover those costs from the real estate? He may certainly recover the amount of the debt which has been established by the creditor, and which I assume the executor to have paid. But I cannot discover any principle for fixing the real estate with the costs of litigation to which the executor has been wrongfully put, by a person setting up against the testator's estate an unfounded claim of debt. If such costs have been properly incurred by the executor, he may retain them out of any funds coming to his hands as executor. But that is because they have been costs necessarily incurred in the due administration of his testator's estate. And the rule in *England*, and, as I conceive, in *Scotland* also, is, that the costs of administration are paid out of the general personal estate. Lord *Currie-*

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*hill* (1) treats it as clear that in *Scotland* an executor properly incurring costs for the benefit of third parties claiming under the testator, is entitled to be indemnified out of the executry estate itself, and not out of the estate for the benefit of which they were incurred. This is, I conceive, in exact conformity with the law of *England*.

There is a great deal of discussion among the Judges who decided this case in *Scotland*, as to how far all, or any part of this sum claimed for expenses ought or ought not, to be considered as properly incurred. But to all such inquiries I think that Lord *Lovat* and the other heirs of entail are entitled to say, that in such a question they have no concern. If improperly incurred they must fall personally on those who incurred them. If properly incurred they will constitute a valid claim against the executry or personal estate of the testator. But in no view of the case can they be treated as a debt due and owing by the deceased at his death. Costs incurred by an executor in resisting an excessive demand against the estate of the deceased, whereby the demand established is reduced in amount, cannot be put higher than costs incurred in resisting a demand which wholly fails. But surely if, when a claim is set up against an executor, the party claiming fails in establishing any demand whatever, it would be strange to say that the costs of resisting such an unfounded demand was a debt due from the testator at his decease. They may be costs against which the executor is entitled to be protected, but this would be not because they could be called a debt due from the testator, but because they formed part of the general costs of administration.

It was argued that when there is a charge on an estate, and the amount of that charge has to be raised by sale or mortgage, the sum to be raised will include the costs of raising it. That is undoubtedly so. The persons entitled to an estate burthened with debts take it subject to a definite charge, *i.e.* definite when the amount of the debts has been ascertained; but they who call themselves owners are not in fact owners till they have first satisfied the charge. They are bound to have by some means the full amount of the charge forthcoming; and it is obvious, therefore,

(1) Court of Session Cases, 2nd Series, vol. xxi. p. 1173.

that they must at their own cost get at the necessary amount. But this bears no resemblance to the costs incurred in ascertaining what the amount of the charge is.

I am therefore of opinion that your Lordships ought to dismiss the appeal against the interlocutor complained of by Lord *Lovat* so far as relates to the £6186; to reverse the interlocutor complained of by Lord *Lovat* as to the £323; and to affirm the interlocutor complained of by the cross appeal of Mr. *Fraser* as to the £2791. But under all the circumstances I think there ought not to be any costs of appeal.

LORD CHELMSFORD:—

My Lords my opinion has fluctuated a good deal during the course of the argument; but I have at last arrived at the same conclusion as that of my noble and learned friend on the woolsack. I agree with him in his general views with respect to the primary liability of the personal estate to bear the cost of litigating debts which are made a charge upon the real estate. I consider the true question in this case to be, whether any intention is expressed or necessarily implied in the deed of entail of 1851, that this burthen should be shifted from the executry and laid upon the entail.

By the deed of 1851 the estate is entailed "with and under the burthen of payment of all the just and lawful debts of the said deceased *Archibald Fraser* due or addebted by him at his death which said debts" (it is added) "shall in nowise *affect or diminish his executry* or other funds, property and effects." Under these words the question arises whether the costs incurred by the executor in litigating the claims of the creditors of *Archibald Fraser* can be construed to be just and lawful debts" or necessary incidents to such debts, within the meaning of the deed.

This being upon my view merely a question of construction, it is immaterial to inquire whether the litigation was for the benefit of the entailed estate or not, or whether *Abertarff* acted prudently or otherwise in defending the action. It may be admitted that as executor he was not bound to pay debts without previous investigation: that when the actions were brought against him he had no alternative but submission or defence; and that his submission

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would have burthened the entail more than his resistance. All this may be conceded, without in any degree affecting the question of the true meaning and construction of the deed.

The "just and lawful debts" of *Archibald Fraser*, due at his death, are alone to be a burthen upon the entail. Under this description everything incident to or inseparable from the debts would be included. For instance, suppose the debts bore interest, and interest accrued upon them, after the death of *Archibald Fraser*, it would, as a matter of course, follow the principal, and contribute to increase the burthen upon the entail. But the costs and expenses of an action brought to enforce the payment of a debt are not necessarily incident to it; and when a person is providing for the payment of his just and lawful debts, probably the last thing he thinks of is the idea of their becoming the occasion of litigation.

Is there anything in the language of the deed to show that the entailer had in his view anything beyond the debts themselves as a burthen upon the entailer. I think rather too much stress was laid in the argument on the words employed to express the entailer's meaning. It was said that the expression "shall in nowise affect or diminish his executry" manifested the intention of the entailer that the executry should be discharged from every liability which in any manner might be incurred by reason of the debts due from *Archibald Fraser*. But the word "nowise" seems to have been used merely to intimate more emphatically that the debts themselves were not in any event to be paid out of the executry.

The settlor never having anticipated that any costs could be incurred with respect to the only debts in his contemplation, viz., the "just and lawful debts of *Archibald Fraser* due at his death," made no provision for such an event. In the absence of any specific direction upon the subject, there is nothing to exonerate the executor from his original liability to satisfy such costs out of the general personal estate.

If in this case the executor and the heir in tail had been different persons, the executor, upon actions being brought against him by the creditors of *Archibald Fraser*, might have given notice to the heir, and taken his directions as to defending

them, and might have refused to make any defence unless the heir would guarantee him against the costs. But the same person being both executor and heir in tail, he could not by any act of his own shift the burthen of the costs from the executry to the entail.

The narrow view (as it may be considered) which I have taken of this question, renders it wholly unnecessary to advert to the distinction acted upon in the Court below between the litigation being profitable or unprofitable to the entail, or the defences being proper or improper, as indicated by the award of costs in the several actions. The costs, whether properly or improperly incurred, could not be converted into debts retrospectively due from *Archibald Fraser* at his death, and must all of them, in my opinion, be paid out of the personal estate.

I agree with my noble and learned friend on the woolsack as to the costs of the present appeal.

LORD KINGSDOWN :—

My Lords, this case has occasioned much difference of opinion in the Court below, and I am sorry to say that such difference extends to your Lordships' House, for I confess that I find myself unable to concur in the views of my noble and learned friends who have already addressed you.

Lord *Handyside* was of opinion that none of the costs could be thrown on the estate, holding that the case was the same as if, without any special charge, the heir of entail in possession had resisted any action brought against him in that character, in which case the expenses would have fallen upon him personally (1).

But when the interlocutor of Lord *Handyside* was brought before the Inner House it was recalled (2), and it was remitted to the Lord Ordinary to allow parties, before answer, an opportunity of substantiating their respective averments as regards the claim for the amount of these costs.

The question then came before Lord *Kinloch* as Lord Ordinary, who was of opinion that under the terms of the entail, burdening the lands of *Abertarff* and others with the debts of the grantor, and declaring that "these debts shall noways diminish any executory

(1) Second Series Court of Session Cases, vol. xxi. p. 1160. (2) Ibid. p. 1164.

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or other funds, property, or effects," the expense *bonâ fide* incurred in having the debts so charged fairly expiscated, and their amount adjusted, is in sound construction a consequent of the debts, and equally chargeable on the entailed lands with the debts themselves. He accordingly pronounced an interlocutor on the 8th of June, 1858 (1), in which he found the pursuer entitled to relief out of the lands and estate of *Abertarff* of the expenses, whether incurred by himself or his agent, or found due by him to his antagonists, disbursed or incurred by him, of having the debts chargeable against the said lands and estate, and the amount thereof fairly settled and adjusted, but of no other expenses; and with regard to the five litigations, the costs of which are in dispute, he found the pursuer entitled to them (with the exception of the costs incurred in a particular question), subject as regards his own costs to taxation, and he remitted it to the auditor of the Court to examine the accounts of expenses of which the pursuer claimed relief, and to separate and tax the same consistently with the foregoing findings and report.

The intention of this interlocutor, as I understand it, was to decide that the pursuer was entitled to the costs of the five actions, so far as the proceedings taken by him in each action were properly taken with the view previously expressed, viz., that of having the debts chargeable against the estates, and the amount thereof fairly settled and adjusted, and to direct the disallowance of all expenses not falling within that category, and to refer it to the auditor to inquire and determine what expenses under that declaration were properly chargeable on the estate.

I do not think that when the case came before the Inner House any of the Judges, except Lord *Curriehill*, dissented from the principles of Lord *Kinloch's* judgment. Lord *Ivory* discusses the question in a most able and elaborate judgment, in which he supports the view of Lord *Kinloch* in an argument which it seems to me extremely difficult to answer. Lord *Deas* agrees with Lord *Ivory* as to the general principle, and the Lord President, though in some degree objecting to the form of the summons, I think intimates that he does not disagree with the general views of the Lord Ordinary (2).

(1) Second Series Court of Session Cases, vol. xxi. p. 1164. (2) Ibid. p. 1166.

The ground upon which the decision of the majority of the Judges, disallowing the costs in four of the actions, proceeds is, that inasmuch as in those actions the Defendant was ordered to pay costs to the pursuer, the defence of them must necessarily, in the opinion of the Courts who decided them, have been improper.

I cannot concur in that conclusion. A Defendant in a suit is often ordered to pay costs, not on the ground that there was anything in his conduct deserving of censure, either in the fact of resisting a Plaintiff's claim, or in the mode in which the resistance was conducted, but on the principle that a Plaintiff who succeeds in establishing a demand is *primâ facie* entitled to receive the costs to which he has been put in making it out.

But an executor or trustee who is ordered to pay costs to the claimant is entitled (unless he has forfeited his right by some laches or misconduct) to recover from the estate which he has defended not only the costs which he has incurred to the adversary, but also the costs which he has paid to his own solicitor. The real question is, therefore, in what position did *Abertarff* stand when these actions were defended by him or on his behalf.

The disponer could not as against his creditor relieve his personal estate from the payment of his debts, or his executor from the liability of being sued for them. But the executor was entitled to be repaid out of the real estate whatever he might be compelled to pay out of the personalty. He stood therefore really in the situation of a person who, in admitting or resisting claims, was acting on behalf of others, that is, of those who were entitled to the real estate. In other words, he was trustee for them. He could not take their directions as to the payment of the sums demanded, or the resistance to the claims, for he was himself the first institute under the entail, and his issue male were the first substitutes; and though, as it seems he has no issue male, Lord *Lovat's* succession has now become highly probable, at that time it was very remote. When some of these demands were made, *Abertarff* was a minor, and the rest were brought forward very soon after he came of age. He could have no knowledge of the circumstances or amount of them. He could have no sinister interest in resisting them; indeed, whether they fell on the real

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or the personal estate, he supposed that he alone was interested in the matter. In all cases the resistance occasioned a substantial reduction of the original demand, though in some the costs exceeded the amount of the reduction. It may turn out upon inquiry that some part of these costs may have been improperly incurred, and if so they will be disallowed; but I agree in Lord *Kinloch's* judgment, that such expenses as were properly incurred ought to be allowed. I should be inclined to introduce the word "properly" before the words "disbursed or incurred," and the words "properly incurred" before the words "in the said litigations;" and with these variations, which are merely intended to express more clearly the meaning of Lord *Kinloch*, to affirm the interlocutor of the 8th of June, 1858, and reverse the interlocutor of the 7th of July, 1859, so far as it recalls the interlocutor of the 8th of June, 1858 (1).

When an estate is devised to trustees in trust to raise and pay the amount of a testator's debts, the trustee is entitled to be reimbursed out of the estate whatever expenses he has properly incurred in ascertaining the amount, or in raising the sums necessary for paying it.

When the estate is charged with debts, but no express trust is created for paying them, the heir or devisee becomes, I apprehend, a trustee for the purpose. If he be the absolute owner subject to the charges, of course no question arises; but if he have no in-

(1) The following is the passage in Lord *Kinloch's* interlocutor, to which Lord *Kingsdown* refers:—"Finds the pursuer entitled to relief out of the lands and estates of *Abertarff* and others contained in the deed of entail executed by him under authority of the court, on 8th February, 1851, of the expenses, whether incurred by himself to his own agent, or found due by him to his antagonists, disbursed or incurred by him in having the debts chargeable against the said lands and estates, and the amount thereof fairly settled and adjusted, but of no other expenses; and more particularly, with regard to the five litigations set forth by the pursuer in his minute, finds the pursuer not entitled to relief of the expenses, whether incurred by himself or found due by him to his antagonists in any of the said litigations, disbursed or incurred in the question whether the pursuer or Mr. *Fraser* of *Lovat* was the party liable in the claims therein advanced: with this exception, finds the pursuer entitled to relief of the expenses in the said litigations, whether incurred by him, or found due by him as aforesaid, but subject to taxation by the auditor as betwixt agent and client, so far as consisting of expenses incurred by him to his own agent."

terest, or only a limited interest, then he stands, I think, in the same position with any other trustee.

The peculiar situation in which *Abertarff* stood, of representing the executry to which the creditors had a right to resort, seems to me to strengthen his claim to be considered a trustee.

Assuming that he has acted prudently and properly in requiring the debts to be made out, he ought not to be subjected personally to costs which have been incurred in protecting the estate which he represents. But the testator has declared that the debts (and impliedly, therefore, in my opinion the costs of ascertaining them), shall not diminish his executry. The necessary consequence seems to me to be that they must fall upon the real estate. But as a majority of your Lordships think differently, of course the judgment will be as proposed by the Lord Chancellor.

*The judgment of the House was as proposed by the Lord Chancellor* (1).

Solicitors for the Appellants: Messrs. *Grahames & Wardlaw.*
Solicitors for the Respondents: Messrs. *Loch & McLaurin.*

(1) See *supra*, p. 32.

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HOWDEN - - - - - - - - APPELLANT;
THE HON. C. FLEEMING *et al* - - - RESPONDENTS.

*Strict Scotch Entail—Irritant Clause.*

Case in which it was held that the irritant clause in a strict entail was not rendered nugatory by the use of a word which, though unhappily chosen, expressed nevertheless with sufficient distinctness the meaning required for validity.

*Capability of the word* "MADE":—The irritant clause, after nullifying all contraventions, closed with these words: "sicklike as if the same had never been *made*":—

*Held*, that the word *made*, though translated *concessa*, was capable of being applied to the contracting of debt.

*Emphasis or Surplusage*:—*Held*, also, that the entire passage quoted was not restrictive of what went before, but was rather emphatic, or at the worst, amounted to no more than mere illustration or surplusage.

THE action was commenced in September, 1862, by the late Lady *Clementina Elphinstone Fleeming*, Viscountess *Hawarden*, sister and heiress of entail to the 14th Baron *Elphinstone;* and by her husband, Viscount *Hawarden;* for the purpose of obtaining from the Court of Session a decree declaring that certain estates in the county of *Lanark* were, by the several instruments set forth in the pleadings, strictly and validly entailed according to the requirements of the Act, 1685.

There were three distinct deeds, in which the wording of certain clauses formed the subject of dispute and litigation. The first was the entail of the *Wigton* Estate executed by her Ladyship's ancestor, *John*, Earl of *Wigton*, in 1741, and being executed by the Earl of *Wigton*, was called the *Wigton* entail. The second was the entail of the *Waterhead* Estate, executed by a family trustee on the 29th of December, 1847. And the third was the entail of the *Cumbernauld* Estate, executed by certain statutory trustees on the 10th of July, 1850.

Of these three estates Lady *Clementina*, Viscountess *Hawarden*, was the heiress of entail. The *Wigton* entail, however, was the one on which the argument arose and to which the discussion was confined, it being agreed that the *Waterhead* entail and the

*Cumbernauld* entail were in no material respect different from the *Wigton* entail, the three being represented as "expressed in precisely the same words, and of course subject to the same construction."

The defence put in by Mr. *Howden*, as trustee of the estate of the late Lord *Elphinstone*, was mainly that the deeds in question were ineffectual as deeds of strict entail, "in respect that the irritant clause therein did not apply to or embrace the prohibition against the contracting of debt, nor did it strike at adjudications led or diligence used against the lands for debt contracted."

The irritant clause on which the question turned was as follows: "If it shall happen any of the heirs of tailzie above-mentioned to contravene the provisions and limitations above written, or any of them as the same are above expressed, then, and in that case, all such acts and deeds of contravention are not only hereby declared to be null and void to all intents and purposes, sicklike as if the same had never been made; but also the heir so contravening shall lose all title to the said lands, and they shall belong to the next heir," &c.

It further appeared that in the first investiture by Crown Charter of resignation in 1751, and in all the title deeds following thereon, the word "made," above quoted at the close of the irritant clause, was translated by the Latin word *concessa*.

On the case coming before the Lord Ordinary (1), the present Appellant argued, *first*, that the word "made," in the irritant clause, restricted the import of the previous words occurring therein to debts constituted by written instruments, because he contended that though one may make a writing one cannot accurately be said to make a debt; *secondly*, the Appellant relied on the word *concessa*, which he affirmed could never be used as applicable to the contracting of debt; and *thirdly*, the Appellant insisted on the judicial rule that in dealing with strict entails, when a clause admits of two constructions, that which "makes for liberty" is to be preferred (2).

The Lord Ordinary, however, overruled these objections, and decided that the entails in question were in all respects valid and effectual, and his interlocutor to that effect was adhered to and

(1) Lord *Kinloch*. (2) Third series of Court of Session Cases, vol. iii. p. 753.

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confirmed by the Second Division of the Court of Session on the 24th of March, 1865.

In support of the present appeal to the House, the *Attorney-General* (1); and Mr. *Rolt*, Q.C., for the Appellant, deemed it unnecessary to remind their Lordships of the rule that Scotch entails, by reason of their locking up property, were *strictissimi juris*. That they were subject to a severe and peculiar construction had often been decided by the House. Thus what said Lord *Wensleydale* in the *Earl of Kintore* v. *Lord Inverury* (2), "If an expression in an entail fairly admits of two meanings, that construction is to be adopted which destroys the entail, rather than that which supports it." Mere intention goes for nothing; for as Lord *Brougham* observed in the *Hoddam Case* (3), "There can be no doubt as to the intention of the party. No man means to make a bad entail. But he must carry it into effect. He must execute it validly." This being so—we have here an entail with a prohibitory clause complete and unobjectionable. But the question is as to the closing paragraph of the irritant clause, which we say is clearly inapplicable to the contracting of debt. The words are, "sicklike as if the same had never been made." The word *made* is restrictive of the preceding words in the clause, and cannot include debt or the contracting of debt. But if there were room for doubt as to the import of the word debt,—can there be any when we find it translated into *concessa*. What is concession? He who is in debt cannot concede it. The words in the investiture are, "*Omnia talia facta declarantur vacua et nulla eodem modo ac si eadem nunquam fuerant concessa.*" Debts, therefore, in spite of this interdiction may be contracted; adjudications may be led; and the estate may be evicted. Omissions too, are forbidden by the entail; but omissions cannot be *made*—still less can they be conceded. Lord *Campbell* in *Lumsden* v. *Lumsden* (4), said that the word *deeds* as occurring in that case, "were spoken of as made or granted,—terms only applicable to written instruments;" and so we in the present case assert that the irritant clause, qualified by the word "made," applies, if it applies at all, only to contraventions by written instruments, and cannot extend to debts otherwise contracted, which the

(1) Sir *Roundell Palmer*.
(2) 4 Macq. 527.
(3) 2 Bell, 125.
(4) 2 Bell, 115.

irritant clause, restricted as we contend it ought to be, clearly overlooks (1).

At the close of the argument on behalf of the Appellant, the Lord Chancellor (2) remarking that it was deemed unnecessary for the Respondent's Counsel (Mr. *Anderson*, Q.C., Sir *Hugh Cairns*, and Mr. *Pattison* of the Scotch Bar), to address the House,—the following opinions were delivered:

THE LORD CHANCELLOR (2):—

My Lords, upon very intelligible grounds, the Courts of *Scotland* and this House, have always construed deeds of entail strictly, so as to give no encouragement to the fettering of the ordinary circulation of property. And if it can be fairly done, the Courts in *Scotland* and this House, which is for these purposes the same as a Court in *Scotland*, will be (so to speak) astute in so construing a deed as to hold that it does not create an entail. But although the rule of construction in favour of a free circulation of property has been for a long time adopted and acted upon, it must not be a rule that is to lead Courts of justice and this House to pretend to see doubts and difficulties where there are none; and to put a construction upon words which no person, looking at them fairly, can possibly for a moment entertain.

Now let us see what the point is here. The entail has, *in gremio*, the three ordinary prohibitions; a prohibition against alienation, a prohibition against diverting the course of descent chalked out in the deed, and a prohibition against incurring debts whereby the lands might in future get into the hands of creditors; and then follows this irritant clause: "and further providing that if it shall happen any of the heirs of tailzie above mentioned to contravene the provisions and limitations above written, or any of them," that is if the heirs of entail shall either do the positive act of alienating, or the positive act of diverting the course

(1) To shew how critical is the examination of Scotch entails when challenged *in judicio*, we may refer to the case of *Sharpe* v. *Sharpe*, where the want of a nominative was held fatal, although capable of being supplied by the context, Lord *Brougham* logically remarking, that "here the most important of all omissions occurred—namely, the omission of one of the three constituent parts of a proposition, the subject of what is predicated." *Sandford* on Entails, 126.

(2) Lord *Cranworth*.

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of succession, or the negative act (as I read it) of incurring debts, whereby the lands might, as we should say in this country, be taken in execution; "then, and in that case, all such acts and deeds of contravention," words that clearly include acts of omission, as well as commission (if it be said that omission is not an *act*, I would appeal to the very language I have used, "acts of omission," which is a very common expression) "then and in that case all such acts and deeds of contravention are not only hereby declared to be void and null to all intents and purposes," (then just leave out the few following words, and proceed) "but also the heir so contravening shall *ipso facto* amitt, lose, and tine, all right to the said lands and estate," &c. What are the words that are said to create the doubt? They are these, "sicklike as if the same had never been made."

Now it is said that an act of *omission* cannot be *made*, and that therefore you must so construe these words as to confine them to acts of commission, which, although not very accurately, we may say are acts "made."

To this there are two answers, which are perfectly satisfactory to my mind, namely, first, that inasmuch as the words are "sicklike as if the same had never been made," and inasmuch as the word "same" applies to all the deeds and acts of contravention specified, and those deeds and acts include acts of omission as well as of commission, if the word "made" is not aptly used, it is only that the party who prepared the deed has used a word incautiously that does not include everything that was intended. But I do not think that signifies; for if the word "made" is applicable only to deeds properly so called, then I say the passage must be read *reddendo singulos singulis;* that is, if there is any contravention, then, in every case, the estate is to go over, and the party is to lose it, and further, all deeds of contravention shall be deemed void to all intents and purposes, "sicklike as if the same had never been made." And this latter construction applies exactly, as well to the subsequent Latin instrument, the deed of investiture, as it does to the original deed of entail. Whether the Lord Ordinary arrived at the conclusion to which he came upon right grounds, it is not material to inquire, but I think there is not the least doubt that the Lord Ordinary and the Court of Session both arrived at the

proper conclusion, and therefore I have no hesitation in moving your Lordships to affirm the interlocutors appealed from.

LORD CHELMSFORD:—

My Lords, the words "sicklike as if the same had never been made" are, in my opinion, not explanatory or interpretative, but merely emphatic; and if you give a qualifying and restrictive sense to these words, then, although it is perfectly clear that acts, as well as deeds of contravention, were intended to be rendered null and void, you would have to strike the word "acts" entirely out of the irritant clause. The question is so very clearly put by the Lord Justice *Clerk*, that I can only adopt his language in expressing the same opinion. His Lordship says (6):—"It rather appears to me that the sentence 'sicklike as if the same had never been made" is only surplusage, quite unnecessary to the completion of the irritant clause, or to working out or explaining its meaning, but that it is neither intended, nor, according to the grammatical structure of the sentence, is it calculated, to restrict what goes before it. I am well aware that it may not have been intended to restrict what goes before, and still it may have that effect according to the construction which is given to deeds of entail. But I think it is neither intended, nor, according to the proper grammatical structure of the sentence, is it calculated, to have that effect. A declaration of irritancy which is followed by such words as 'in so far as' would be very different, because a sentence introduced by the words 'in so far as' clearly imports a limitation of what goes before. And in like manner, if you were to say that all acts and deeds 'are to be irritated to this effect that,' you would then limit what goes before by that which follows. But I think the true meaning of the words 'sicklike as if' is not to limit what goes before, but that it is an attempt to expound by an illustration the meaning of that which goes before."

That is very clearly expressed. I entirely agree with it, and I think your Lordships ought to affirm the decision of the Court below.

(1) Court of Session Cases, Third Series, vol. iii. p. 754.

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LORD WESTBURY:—

My Lords, I think the judgments appealed from are extremely satisfactory, and that both the Lord Ordinary and the Judges of the Second Division have arrived at the right interpretation of the language of this entail.

*Interlocutors affirmed and Appeal dismissed with costs.*

Solicitors for the Appellant: *Messrs. Connell & Hope.*
Solicitors for the Respondents: *Messrs Tatham & Proctor.*

BICKETT . . . . . APPELLANT;

AND

MORRIS *et Ux.* . . . . . RESPONDENTS.

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*May* 1, 3, 4; *July* 13.

*Riparian Ownership—Alveus of a running Stream.*

The soil of the *alveus* is not the common property of the respective owners on the opposite sides of a river; the share of each belongs to him in severalty and extends *usque ad medium filum aquæ*; but neither is entitled to use it in such a manner as to interfere with the natural flow of the stream.

A fence or bulwark on the bank is allowable; but the *alveus* is sacred.

Any encroachment by one proprietor may be resisted by the other; and the onus of proving that the act is *not* an encroachment falls on the party doing it, who is *primâ facie* held responsible.

Mere apprehension, without some show of injury, will not ground a complaint; but it is not necessary to obtain or to be guided by scientific opinions.

*Per* Lord *Westbury*:—This decision establishes the important principle that an encroachment on the *alveus* of a running stream may be complained of, without the necessity of proving that damage has been sustained, or is likely to be sustained.

*Personal Bar against objecting to an appeal.*—Where, with the acquiescence of both parties, a Judge Ordinary deviates from the *Cursus Curiæ*, he thenceforth ceases to act judicially, and becomes an arbitrator, subject to no appeal. But if the party against whom the Judge Ordinary—*quâ* arbitrator—decides, reclaims to the Inner House, and there obtains a reversal, he is personally precluded from afterwards objecting to an appeal by his opponent to the House of Lords.

THE Appellant and Respondents were owners of property, directly opposite each other, on the banks of the river *Kilmarnock*, in *Ayrshire*.

In October, 1860, the Appellant applied to the Respondents for permission to carry certain contemplated building operations a specified distance into the channel of the stream. The Respondents agreed; and an arrangement was concluded, giving the Appellant permission, in consideration of a payment of £10, to extend a wall or building, then standing on the premises, into the *alveus* as far as was indicated by a red line laid down on an ordnance map, subscribed by both parties in token of their assent.

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The Appellant proceeded to build, but in such a direction that the Respondents, on the 4th December, 1861, applied to the Court of Session for a suspension and interdict against him, and on the 5th February, 1862, brought an action to have it declared that the Appellant had no right to erect buildings on the *solum* of the river beyond the red line aforesaid, and further concluding for a declaration that his erections had gone beyond the stipulated limit, and also praying that he should be ordered forthwith to pull down and remove them in so far as complained of.

In support of their case the Respondents submitted the following as pleas in law:—

1. The Respondents are entitled to decree for removal of the buildings and other encroachments complained of, and for interdict, as concluded for.

2. The Appellant has no right to encroach upon the bed of the river, opposite to the property of the Respondents, without their consent; and the encroachments complained of,—being injurious to their property, and not only in contravention of the contract, but in violation of their rights under their titles, and at common law as the proprietors of the opposite bank,—they are entitled to decree, in terms of the several conclusions of the summons.

3. The Respondents having reasonable grounds to fear that the Appellant, who has already encroached by his operations upon the bed of the river, intends to continue his operations, and encroach farther, and may again encroach,—are entitled to interdict against future encroachment.

The Appellant, by his defence, denied the Respondents' allegations, and rested his case on the following pleas in law:—

1. As proprietor of the subjects in question the Appellant was entitled to erect the buildings now complained of, and the Respondents have no right or title to object to the same.

2. The Appellant not having in point of fact built upon the bed of the river beyond the line indicated upon the map, the present action ought to be dismissed.

3. The property of the Respondents not being in any way injured, or threatened to be injured, by the buildings erected by the Appellant, the Respondents have no title or interest to object to the wall built by the Appellant in the bed of the river.

4. The said buildings were commenced, carried on, and completed in the full knowledge and with the acquiescence of the Respondents.

The Lord Ordinary, on the 16th July, 1862, allowed to both parties "a proof of their respective averments," but instead of remitting the case to the Jury Court (the proper course), he, with the consent of both parties, "appointed the proof to be taken by commission."

When the result of the commission was reported, the Lord Ordinary found that the Respondents "had failed to prove" their case; and therefore his Lordship "repelled the reasons of suspension, and assoilzied the Appellant from the conclusions of declarator, removing, and interdict, and found the Appellant entitled to expenses."

The Respondents reclaimed to the Second Division of the Court of Session, who altered the Lord Ordinary's interlocutor, and ultimately, on the 20th of May, 1864, decided that "the erection complained of was in the *alveus* of the river *ex adverso* of the Respondents' property, and had the effect of diverting to a certain extent the flow of the water, and was therefore an illegal encroachment on the Respondents' rights." Accordingly, the Second Division "found and declared, decerned, and ordained, prohibited, and discharged, in terms of the conclusions of the summons of declarator; and in the suspension and interdict, suspended and interdicted as craved, and declared the interdict perpetual, and found the Respondents entitled to expenses."

The principle of this decision, as collected from the opinions of the Judges reported in the Court of Session Cases (1), was, that a riparian proprietor is not entitled to erect a building or make any change in the *alveus* of a stream, without the consent of the opposite proprietor; for the *alveus* of a stream is not the common property of the owners of the opposite banks, but each is absolute proprietor to the *medium filum fluminis*, which constitutes the line of division between them (2).

(1) 3rd Series, vol. ii. p. 1082.

(2) See *Wishart* v. *Wyllie*, 1 Macq. 389. For the distinction between rivers navigable and rivers not navigable, see *Lord Advocate* v. *Hamilton*, 1 Macq. 46, shewing that the soil of the *alveus* in rivers navigable is in the Crown.

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Against the judgment of the Second Division the present appeal to the House was presented; but the Respondents presented a petition against its reception, on the ground that the cause being one which by statute was appropriated to trial by jury, and the parties having *by consent* deviated from the prescribed course, the decision was in fact by arbitration, and consequently was not appealable. This petition was referred to the appeal committee, who reported that the question of competency should be argued, along with the merits, at the bar of the House.

Under these circumstances, Mr. *Rolt*, Q.C., and Mr. *Anderson*, Q.C., (with Mr. *G. F. Anderson*), appeared as counsel for the Appellant:—

There were two questions for their Lordships' determination. The first was, as to the general legal right of a riparian owner, independently of agreement. The law of *Scotland* on this point was not different from that of *England*. The bed of a river was the property of each riparian owner to the middle of the stream, and each was entitled to make use of it, so long as he did not injure his neighbour or interfere with the flow of the water. Yet here the Appellant was dragged into court simply for building on his own property and taking in a small strip of the *alveus*—a strip which at one end was only about two feet six inches wide, and which gradually grew less towards the other end.

[THE LORD CHANCELLOR:—What is the depth of this river?]

Mr. *Rolt*:—Not more than two feet where it is deepest. The doctrine of the Court below is much too strong. They affirm broadly that no erection whatever, great or small, can be made by a riparian owner on his side of the river. But we contend that, unless the erection complained of does some material damage to the Respondents, they have no right to interfere by action or by interdict. Injury must be shewn. It is not enough that the operation is *in alveo*. According to the Roman law, there is no ground for an interdict, unless what is complained of be *cum incommodo accolentium* (1). And in the analogous case of buildings, it has been decided by the Court of Session that the proprietor

(1) Dig. B. 43, t. 13, s. 3; and see *Ripon* v. *Hobart*, 3 Myl. & K. 169.

of an under-tenement is not entitled, without proving injury, to object to a projection of the frontage by the owner of the upper tenement (1).

The next question was, whether what the Appellant has done was not fully warranted by the agreement.

[LORD WESTBURY:—It is clear that neither of you have proved, or can prove, that the red line was departed from or adhered to.]

That may be so. But on whom is the onus of proof? It is for the Respondents (who were Pursuers below) to make out their case. They have failed to do so, and therefore the decision of the Inner House ought clearly to be reversed.

According to this decision any encroachment, however small, by one riparian owner, would justify complaint from the opposite proprietor.

[LORD WESTBURY:—If I build a boat-house, though it injures no one, it would seem that any riparian owner, however distant, may complain.]

Here the Respondents saw day by day the work going on, and they did not object till £1200 had been expended on the building.

The appeal is alleged to be incompetent; but the ground taken by the Respondents constitutes an objection to their own reclaiming note, upon which the Lord Ordinary's interlocutor was reversed; and they are now precluded from questioning the jurisdiction of the House.

The *Attorney-General* (2), and Mr. *W. A. O. Paterson*, for the Respondents:—

This appeal is incompetent. The Court below had no right to decide without a jury. They, therefore, did not act judicially, but as arbitrators.

[LORD WESTBURY:—But you appealed from the Lord Ordinary to the Inner House.]

(1) *Urquhart* v. *Melville*, 2nd Series, vol. xvi. p. 307.
(2) Sir *Roundell Palmer*.

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The *Attorney-General*:—Both parties desired the Inner House to decide the case (1).

[LORD WESTBURY:—Do you dispute the proposition, that if there is no damage there can be no action for an encroachment?]

The *Attorney-General*:—Some acts necessarily import damage and this is one of them. All obstructions in the bed of a river are illegal. A precise specification of consequences may be impossible. The law will presume injury from the mere fact of encroachment. But in this case there was proof of actual damage; or, at all events, of that reasonable apprehension which in such a case is legally equivalent. With reference to erections *in alveo*, the maxim is, *potior est conditio prohibentis: Blantyre* v. *Dunn* (2); *Hamilton* v. *Edington* (3); *Burnis* v. *Brown* (4); *Gellatley* (5). Lord *Kilkerran*, in reporting the Scotch case of *Farquharson* (6), lays it down that although a riparian proprietor may build a fence to fortify his land against the stream, "he must not use any operation in the *alveus*." To the same effect is the decision in *The Magistrates of Aberdeen* v. *Menzies* (7). And the law is even more authoritatively stated in *Menzies* v. *Breadalbane* (8), which came to this House, and was adjudged by the advice of Lord *Eldon*.

The following are the opinions which were delivered by the Law Peers on the motion for judgment:

THE LORD CHANCELLOR (9):—

My Lords, the first question to be considered is the competency of the present appeal. It appears to me that this is one of the actions "appropriate to the Jury Court," under the 28th section of the *Scotch Judicature Act*, the 6 Geo 4, c. 120, being an action on account of an injury to land in which the title was not in question. By the word "title," I do not understand to be meant the

(1) There was some controversy on this point at the Bar.
(2) 10 Dunlop, 542.
(3) Morr. Dict. voce Prop. 12, 826.
(4) Hume's Dec. 504.
(5) 1 Macpherson, 592.
(6) Morr. Dict. 12, 787.
(7) Morr. Dict. 12, 787.
(8) 3 Wils. & Sh. 235.
(9) Lord *Chelmsford*, who succeeded for the second time to the Great Seal on Lord *Cranworth's* second resignation of it.

right to do the act which occasioned the injury, but the title to the land itself, to which the injury is alleged to be done.

The complaint is, that the Defender encroached by building beyond a certain line upon the *solum* of the river called the water of *Kilmarnock*, opposite the Pursuers' property. It is in respect of their property in the land that the Pursuers dispute the right of the Defender to encroach upon the river; but the title to the land affected by the encroachment is not at all in question. It was contended by the Appellant that there being no claim for damages in the summons, it was a case not within the 28th section of the *Judicature Act*; but it seems to me that this section is not confined to cases where damages are demanded, but that it extends to all the enumerated causes of action where a question of fact is to be tried, proper for the determination of a jury. The cause ought, therefore, in regular course, to have been remitted to the Jury Court, and the Lord Ordinary had no authority to order the proofs to be taken by commission.

But it was quite competent to the parties to agree that the proof should be taken by commission instead of by a jury; and this having been done, the question arises whether the case was not removed from the regular course of proceeding, so that it could no longer be regarded as a trial *in curiâ*, and subject to appeal.

It is unnecessary to consider the 49th section of the 13 & 14 Vict. c. 36, allowing the Lord Ordinary to take evidence by commission in causes not specially enumerated in the 6 Geo. 4, "as appropriate to be tried by jury," because I have already expressed my opinion that the present cause is one of those enumerated in that Act.

Whether, after having consented to the proof being taken by commission and reported to the Lord Ordinary for his decision, the parties had precluded themselves from presenting a reclaiming note to the Inner House, is a question which it appears to me to be unnecessary to decide. The Pursuers, having failed before the Lord Ordinary, themselves carried the cause into the Inner House by reclaiming note, thereby asserting their right to appeal from the Lord Ordinary's interlocutor. Having obtained from the Court of Session an interlocutor reversing the interlocutor of the Lord

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Ordinary, it would be opposed to every notion of propriety and justice if the Pursuers could successfully resist the Defender's right to question the interlocutor upon the ground of incompetency. By taking the step of appealing to the Inner House, the Pursuers, in my opinion, have precluded themselves from objecting that the interlocutor pronounced in their favour is not subject to all the consequences of other interlocutors, and therefore appealable to this House.

The next question to be determined is one of fact, namely, whether the Appellant has extended his buildings beyond the line permitted by the agreement. Upon this subject the evidence is conflicting, and impossible to be reconciled. The whole difference between the parties depends upon the fact whether the letter D on the plan given in evidence accurately represents the junction between the new wall and the old. If it does, then the new wall is properly represented by the blue line, and there has been an encroachment beyond the agreed limit. If, on the contrary, the letter C on the red line is the point at which the new wall strikes the old, then the Appellant is within the limit prescribed by the agreement. Both parties agree that for a certain part of the new building the foundation of the old wall has been used. This being so, and the building running in a straight line throughout its length, I do not well see how any other than the blue line can be taken to represent the extent of the encroachment. The Judges of the Second Division have come to this conclusion; and even if I were disposed to form a different opinion from them, I should be very unwilling to overrule their judgment upon a question of fact of so doubtful a nature. I therefore assume, as an established fact, that the Appellant has exceeded the limit conceded to him by the agreement.

The important question in the case is, whether the Respondents were entitled to a declaration that "the Appellant had no right or title to erect any building, or otherwise to encroach upon or to interfere with that part of the *solum* of the river which is immediately opposite their property, beyond a certain line, and to a decree ordering him to take down and remove the building or other erections, in so far as these extend into, or encroach upon the *solum* of the river beyond the said line, and interdicting them from

erecting any building, or otherwise encroaching upon the *solum* of the river beyond the line in question."

There is a general statement in the pleas in law of the encroachments complained of being "injurious to the Respondents' property," but no proof was given by them of any actual injury, but only of a probability of injury from the building being advanced further into the river than the line agreed upon.

The result of the opinions of the Judges of the Second Division appears to be, that a riparian proprietor has no right to erect any building *in alveo fluminis;* and if he does so, although the opposite proprietor may be unable to prove that any damage has actually happened to him by the erection, yet, if the encroachment is not of a slight and trivial, but of a substantial description, it must always involve some risk of injury. Lord *Benholme* said: "Without my consent" (*i. e.*, the consent of the proprietor of the other side of the river), "you are not to put up your building in the channel of the river, for that in some degree must affect the natural flow of the water. What may be the result, no human being with certainty knows, but it is my right to prevent your doing it; and when you do it, you do me an injury, whether I can qualify damage or not." And Lord *Neaves* said: "Neither can any of the proprietors occupy the *alveus* with solid erections without the consent of the other, because he thereby affects the course of the whole stream. The idea of compelling a party to define how it will operate upon him, or what damage or injury it will produce, is out of the question."

These views appear to me to be perfectly sound in principle, and to be supported by authority. The proprietors upon the opposite banks of a river have a common interest in the stream, and although each has a property in the *alveus* from his own side to the *medium filum fluminis*, neither is entitled to use the *alveus* in such a manner as to interfere with the natural flow of the water. My noble and learned friend, the late Lord Chancellor, during the argument, put this question: "If a riparian proprietor has a right to build upon the stream, how far can this right be supposed to extend? Certainly (he added) not *ad medium filum*, for, if so, the opposite proprietor must have a legal right to build to the same extent from *his* side." It seems to me to be clear that

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neither proprietor can have any right to abridge the width of the stream, or to interfere with its regular course; but anything done *in alveo*, which produces no sensible effect upon the stream, is allowable.

It was asked in argument, whether a proprietor on the banks of a river might not build a boat-house upon it? Undoubtedly this would be a perfectly fair use of his rights, provided he did not thereby obstruct the river or divert its course; but if the erection produced this effect, the answer would be, that essential as it might be to his full enjoyment of the use of the river, it could not be permitted; *a fortiori*, when the act done is the advancing solid buildings into the stream, not in any way for the use of it, but merely for the enlargement of the riparian proprietor's premises, which must be an infringement upon the right and interest of the proprietor on the opposite bank.

Upon principle, then, the Respondents had a cause of action in respect of the Defender's building, and were entitled to a declaration against the encroachment, and a decree to have the obstruction removed. The authorities cited in the argument at the bar support the principle, and establish a satisfactory distinction. The proprietors on the banks of a river are entitled to protect their property from the invasion of the water by building a bulwark, *ripæ muniendæ causâ*, but even in this necessary defence of themselves, they are not at liberty so to conduct their operations as to do any actual injury to the property on the opposite of the river.

In this case, mere apprehension of danger will not be sufficient to found a complaint of the acts done by the opposite proprietor, because, being on the party's own ground, they were lawful in themselves, and only became unlawful in their consequences, upon the principle of *sic utere tuo ut alienum non lædas*. But any operation extending into the stream itself is an interference with the common interest of the opposite riparian proprietor, and, therefore, the act being *primâ facie* an encroachment, the *onus* seems properly to be cast upon the party doing it to shew that it is not an injurious obstruction.

There only remains the question of acquiescence to be considered. There is no doubt as to the principle of the cases of persons standing by and permitting acts to be done which they

are entitled to prevent. It is only just that a person who has been encouraged to continue expensive operations by the seeming consent of him who might have stopped them, should be able to defend himself against any subsequent attempt to treat them as an encroachment upon the rights of the party who has so misled the other into the confidence that his acts were sanctioned. But, in all such cases, knowledge of the acts done is essential to stop the party who has suffered the encroachment upon his rights from afterwards objecting to it. In this case, there was an agreement between the parties, and it does not appear that the Pursuers knew at first that the Defender was exceeding the limits prescribed by the agreement. As soon as they were aware of the fact they objected to it. The Defender, however, chose to go on in the face of the Pursuers' objection. His proper course would have been to suspend his works until it could be ascertained whether he kept to the permitted line or not. If he determined to proceed, in spite of the objection, it is difficult to understand how he can now claim the benefit of the principle of acquiescence, or how he can reasonably complain that he is compelled to reduce his building within the limits agreed upon.

My Lords, for these reasons, I think the decision of the Second Division ought to be affirmed.

LORD CRANWORTH:—

There is no doubt that the Respondents agreed with the Appellant that, to a certain extent, they would not object to his advancing his building into the bed of the river; so that if the limit to which that agreement extended has not been transgressed, there can be no ground of complaint on the part of the Respondents. If the limit has been transgressed, then there arises a second question, namely, whether, independently of any agreement, the Appellant had not, by the law of *Scotland*, a right to erect the buildings which he has erected in the *alveus* of the river. In the the hearing of this case at your Lordships' bar, the two questions were argued in the order in which I have just stated them; that is, first, whether the Appellant's buildings had been carried further into the river than the line agreed to by the Respondents; and secondly, whether, by the law of *Scotland*, there was anything to

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prevent the Appellant, independently of consent, from erecting the buildings in question.

I will take a different course, and consider, first, what rights the Appellant had, independently of contract or consent.

3 Eq 297

By the law of *Scotland*, as by the law of *England*, when the lands of the two conterminous proprietors are separated from each other by a running stream of water, each proprietor is *primâ facie* owner of the soil of the *alveus* or bed of the river *ad medium filum aquæ*. The soil of the *alveus* is not the common property of the two proprietors, but the share of each belongs to him in severalty, so that if, from any cause, the course of the stream should be permanently diverted, the proprietors on either side of the old channel would have a right to use the soil of the *alveus*, each of them up to what was the *medium filum aquæ*, in the same way as they were entitled to the adjoining land. The Appellant contended that, as a consequence of this right, every riparian proprietor is at liberty at his pleasure to erect buildings on his share of the *alveus*, so long as other proprietors cannot show that damage is thereby occasioned or likely to be occasioned to them. I do not think that this is a true exposition of the law.

Rivers are liable, at times, to swell enormously, from sudden floods and rain, and in these cases there is danger to those who have buildings near the edge of the bank, and indeed to the owners of the banks generally, that serious damage may be occasioned to them. It is impossible to calculate or ascertain beforehand what may be the effect of erecting any building in the stream, so as to divert or obstruct its natural course. If a building should be carried out to the middle of the stream, that is, to the whole extent of the proprietor's right in the *alveus*, no one can fail to see that there might be great danger in case of floods. If the proprietor on one side can make an erection far into the stream, what is there to prevent his opposite neighbour from doing the same?

The most that can be said in favour of the Appellant's argument is, that the question of the probabilities of damage is a question of degree, and so if the building occupies only a very small portion of the *alveus*, the chance of damage is so little that it may be disregarded. But this is an argument to which your Lordships cannot listen. Lord *Benholme* says truly, that what may be the

result of any building in the *alveus* no human being knows with certainty. The owners of the land on the banks are not bound to obtain, or be guided by, the opinions of engineers or other scientific persons, as to what is likely to be the consequence of any obstruction set up in waters in which they all have a common interest. There is, in this case, and in all such cases there ever must be, a conflict of evidence, as to the probable result of what is done. The law does not impose on riparian proprietors the duty of scanning the accuracy or appreciating the weight of such testimony. They are allowed to say, "We have all a common interest in the unrestricted flow of the water, and we forbid any interference with it." This is a plain, intelligible rule, easily understood, and easily followed, and from which I think your Lordships ought not to allow any departure.

It was said in argument, "Then, if I put a stake in the river, am I interfering with the rights of the riparian proprietors?" To this I should answer, *de minimis non curat prætor*. But further, it might be demonstrated in such a case, not that there was an extreme improbability, but that there was an impossibility of any damage resulting to any one from the act. It is, however, unnecessary for us to speculate on any such infinitesimal obstruction. No one can say that in this case the extent to which the Appellant has built into the river is so small as to be, like the case of a stake driven into the soil, inappreciable.

I find nothing in the cases or text books to which we were referred, at variance with the view I have taken of the law. And the cases of the *Town of Aberdeen* v. *Menzies* (1); and *Farquharson* v. *Farquharson* (2), cited by the Lord Justice *Clerk*, are in exact conformity with it. I therefore come, without hesitation, to the conclusion that the Appellant had no right, independently of contract or consent, to build, as he has built, into the bed of the river.

That being so, the only other question is, whether what the Appellant has done has been done with the sanction or acquiescence of the Respondents. For if it has, then, whatever may be the rights of other proprietors on the banks of the river, it does not lie in his mouth to complain. This is a mere question of fact,

(1) Morr. Dict. 12, 787. (2) Ibid.

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and must be decided by an examination of the evidence. I have given to the proofs on both sides my best attention, and the conclusion at which I have arrived is the same as that of my noble and learned friend on the woolsack.

The burthen of proof was clearly on the Appellant. He has erected a wall which, *ex hypothesi*, by the law of *Scotland*, he was not justified in erecting. But then he says to the Respondents, "You cannot be heard to complain of what I have done, for you agreed that I should be at liberty to do it. You in substance sold to me your right to make the objections you are now making." The Appellant, in order to sustain this case, must shew, first, what his agreement with the Respondents was; and secondly, that what he has done was warranted by that agreement.

I am of opinion, with my noble and learned friend, that the Appellant has failed to shew that the Respondents had bound themselves not to object to the line of wall actually built.

With respect to the question raised by the Appellant as to acquiescence, I have only to say that I concur with my noble and learned friend on the woolsack.

On the point of competency it is not necessary to give an opinion. I should have been very slow to hold that the Pursuers, having themselves presented a reclaiming note to the Inner House, and obtained the benefit there of a decision in their favour, reversing that of the Lord Ordinary, can now say: "We will profit by that which is in substance an appeal to the Inner House, and treat that as a regular proceeding *in curia*, and yet hold that an appeal from that decision is *ultra vires*."

LORD WESTBURY:—

10 CLD 709

My Lords, upon the question of competency, it must be understood that the decision of your Lordships proceeds upon its being personally incompetent to the Respondents to raise that objection.

This is a case of very considerable importance, because, as far as I know, it will be the first decision establishing the important principle that an encroachment upon the *alveus* of a running stream may be complained of by an adjacent or an *ex adverso* proprietor, without the necessity of proving, either that damage has

been sustained, or that it is likely to be sustained, from that cause. The examination that has been given at the bar to the cases cited upon that point of law, certainly had led me to the conclusion that it has not yet been clearly established by decisions. I have felt much difficulty upon it, because, undoubtedly, a proposition of that nature is somewhat at variance with the principles and rules established on the subject by the civil law. I am, however, convinced, that the proposition, as it has been laid down in the Court below, and as it has received the sanction of your Lordships in your judgments, is one that is founded in good sense, and ought to be established as a matter of law.

2 Aff Cas 86

When, however, it is said, that proprietors of the bank of a running stream are entitled to the bed of the stream as their property *usque ad medium filum*, it does not, by any means, follow, that that property is capable of being used in the ordinary way in which so much land uncovered by water might be used; but it must be used in such a manner as not to affect the interest of riparian proprietors in the stream. Now, the interest of a riparian proprietor in the stream is not only to the extent of preventing its being diverted or diminished, but it would extend also to prevent the course being so interfered with or affected as to direct the current in any different way that might possibly be attended with damage at a future period to another proprietor.

In the bed of a river, there may, possibly, be a difference in the level of the ground, which, as we know, has the effect of directing the tide or current in a particular direction. Suppose the ordinary current flows in a manner which has created for itself by attrition a bay in a particular part of the bank; if that were obstructed by a building, the effect might be to alter the course of the current, so as to direct the flow with a greater degree of violence upon the opposite bank, or upon some other portion of the same bank; and then, if at that part of the bank to which the accelerated flow of the water in greater force is thus directed, there happens to be a building erected, the flow of the water, thus produced by the artificial obstruction, would have the effect, possibly, of wearing away the foundation of that building at some remote period, and would thereby be productive of very considerable damage.

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It is wise, therefore, to lay down the general rule, that, even though immediate damage cannot be described, even though the actual loss cannot be predicated, yet, if an obstruction be made to the current of the stream, that obstruction is one which constitutes an injury which the Courts will take notice of, as an encroachment which adjacent proprietors have a right to have removed. In this sense, the maxim has been applied by the law of *Scotland*, that *melior est conditio prohibentis*, namely, that where you have an interest in preserving a certain state of things in common with others, and one of the persons who have that interest in common with you desires to alter it, *melior est conditio prohibentis*, that is to say, you have a right to preserve the state of things unimpaired and unprejudiced in which you have that existing interest.

My Lords, upon these grounds I entirely concur with your Lordships, and with the Court below, in the conclusions at which you and they have arrived.

*Interlocutors appealed from affirmed; and Appeal dismissed with costs.*

Solicitor for the Appellant: Mr. *Karslake.*
Solicitors for the Respondents: Messrs. *Loch & McLaurin.*

ROWLEY, THE WIFE . . . . . APPELLANT;

AND

ROWLEY, THE HUSBAND . . . . . RESPONDENT.

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*Compromise of a Divorce Suit favoured.*

Where a suit is in derogation of the marriage contract, the Divorce Court will favour an arrangement which prevents the scandal and opprobrium of a public investigation.

*Difference when the Suit is for Restitution.*

Where a suit is *not* in derogation of the marriage contract, but, on the contrary, is for restitution of conjugal rights, the Divorce Court, in the exercise of its jurisdiction, will disregard all private arrangements; subject, however, to the interposition of the Court of Chancery by injunction on proper occasions.

*Misconduct after Compromise of a Divorce Suit.*

The wife's suit for dissolution was compromised, both parties agreeing to execute a deed of separation with the usual clauses; she specially engaging "not to institute other proceedings in the Divorce Court." In the face of this undertaking, she presented a new Petition for dissolution, alleging adultery committed by her husband subsequently to the agreement, and also renewing the allegation of the adultery and cruelty relied upon in the suit which had been compromised:—

*Held*, that misconduct by the husband after the agreement had not the effect of reviving the wife's remedies, as in the case of condonation, and, consequently, that she was precluded from suing on any facts anterior to the compromise.

MRS. *ROWLEY* married the above Respondent on the 2nd of July, 1844. In October, 1848, she left him, alleging cruelty on his part. In January, 1849, she returned to him. In September, 1849, she again left him, and refused to renew cohabitation; whereupon he commenced a suit against her in the Consistorial Court of *York* for restitution of conjugal rights. To this suit Mrs. *Rowley* set up, by way of defence, an allegation that he had been guilty of adultery and cruelty, and she prayed that a decree of divorce *à mensâ et thoro* should be pronounced in her favour on those grounds. The Court decided in her favour, but the cause was carried by appeal to the Privy Council, where, on the 29th of December, 1853, an order was made to the effect that Mrs. *Rowley*

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had failed in proving the cruelty and adultery pleaded, and that she must return to her husband. In January, 1854, she did so, but she left him again in the November following, and never afterwards cohabited with him.

In 1858 the Divorce Court was established, with jurisdiction to dissolve the marriage contract.

On the 25th of February, 1860, Mrs. *Rowley*, having a separate income, filed her Petition in the new Court, praying for dissolution of her marriage on the ground of cruelty and adultery. In this Petition she did not confine her charges of cruelty or adultery to occasions subsequent to the suit in the Consistorial Court, but adduced several charges, dated in 1848 and 1849, which either were, or might have been, adduced in that suit which had been decided against her.

The Respondent having pleaded to the Petition in the Divorce Court, the cause came on for trial before the late Judge Ordinary, Sir *Cresswell Cresswell*, and a special jury, on the 12th of March, 1861, when it was withdrawn from the jury upon the following memorandum of agreement, drawn up and signed by the respective counsel of the parties:

A juror withdrawn, and Petitioner to move at the proper time to have the Petition taken off the file; the Respondent consenting to the application. The Respondent undertaking to execute a deed of separation, with covenants not to molest the Petitioner, nor to put in force the sentence of the Privy Council, and other usual covenants, including a covenant to allow the Petitioner to choose her own place of abode. The Petitioner undertaking not to institute other proceedings in the Divorce Court.

In consequence of this agreement the issues were not submitted to the jury.

Subsequently, however, in the course of the year 1861, Mrs. *Rowley*, in the face of her agreement, moved the Judge Ordinary to direct her Petition of 1860 to be again set down in the list of causes for hearing and trial.

This motion, Sir *Cresswell Cresswell*, without much hesitation, rejected.

Mrs. *Rowley* appealed to the full Court of Divorce. On the 4th June, 1862, that Court decided against her, by affirming the decision of the Judge Ordinary.

Nevertheless, on the 9th of May, 1863, Mrs. *Rowley* filed a fresh

Petition in the Divorce Court, praying a dissolution of her marriage, by reason, as she alleged, of her husband's adultery and cruelty. This Petition contained paragraphs charging the same alleged acts of adultery as were averred in her original Petition. But it also charged acts of adultery which Mrs *Rowley* alleged came for the first time to her knowledge in March, 1863. The other paragraphs charged acts of cruelty identical with those alleged in her original Petition.

The husband's defence set forth the compromise, and insisted that Mrs. *Rowley's* new suit was in breach of her agreement.

The Judge Ordinary, Sir *James Wilde*, on the 26th of January, 1864, held that Mrs. *Rowley* was bound to abstain from proceedings with reference to all matters anterior to her agreement, but that she was at liberty to sue for subsequent adultery, cruelty being out of the question, as the parties were separated.

So ruling, the Judge Ordinary made the following observations as to the import and effect of the agreement :—

Upon what ground is it contended that this Court ought to permit Mrs. *Rowley* thus to withdraw herself from her own engagements? It has been ingeniously argued, that the adultery charged to have been committed in 1862 revived the previous cruelty, as it would do in an ordinary case of a condonation. Now, condonation is that species of forgiveness or reconciliation which, in furtherance of the marriage bond, the law has declared to be binding only on condition of future good conduct. But here there is no such condition to be found. The agreement has been violated. Why should not the Court give it effect? There is, indeed, a class of suits in which restitution of conjugal rights, and the aid of the Court to enforce the obligations of marriage is sought; and to such, a voluntary agreement to live separate is no answer (1). But in cases like the present, where the Court is asked to derogate from, not to enforce, the marriage bond, it is far otherwise. If cohabitation is to be no longer continued, and choice is to be made between the legal and public remedy, and the voluntary and private arrangement, who can doubt between them? Expense, exposure, uncertainty; the exhibition in open Court of vows broken and duties neglected, to the great scandal of the public, upon whom it is forced, as well as the parties to whom it is the sole legal

(1) Sed vide *Hunt* v. *Hunt*, L. J. (N. S.) vol. xxxi, Part 1, Chanc.; W. Rep. vol. x, p. 215, where Lord Chancellor *Westbury* held (reversing a decree of the Master of the Rolls) that a wife was entitled to an injunction to restrain her husband from proceeding against her for restitution of conjugal rights in the Divorce Court, he having covenanted by a deed of separation that he would not endeavour to compel her to cohabit with him by any legal proceeding. The case was carried to the House of Lords, where, after argument, it became abated without judgment.

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resort—such is the price that must be paid for a remedy which begins by bringing the marriage into disrepute, and ends by impairing or dissolving it. In contrast with this, a voluntary agreement to live apart almost ceases to be an evil, and should find no lack of favour from the Court, when it is designed to replace the greater evil of a public judicial sentence. The result is, that the Court declines to give any directions for the mode of trial; and, on proper application, will entertain the question whether the husband is not entitled to be dismissed from this suit.

Mrs. *Rowley* appealed to the full Court, who made no order on the appeal, but directed that, in case the Respondent did not, before the end of Easter Term, 1865, apply for dismissal of the Petition, Mrs. *Rowley* might ask the Judge Ordinary's directions as to the mode of trial.

On the 26th of May, 1865, the Respondent moved for dismissal of Mrs. *Rowley's* Petition, and on the 30th, the Judge Ordinary dismissed it accordingly.

Mrs. *Rowley* now determined to appeal to the House of Lords (1), and accordingly, in due time, presented her Petition, praying their Lordships to reverse, vary, or alter the Judge Ordinary's decree, and also praying such other and further relief in the premises as to the House in its great wisdom might seem meet.

In support of the appeal Dr. *Deane*, and Dr. *Twiss*, contended that the agreement formed no bar to the Appellant's second suit as to matters which had not been put in issue by her first suit. The adultery which came to her knowledge in March, 1863, was clearly a ground for relief which could not have been waived by an agreement entered into in ignorance of them. Secondly, the Appellant's counsel insisted, that although her remedies were waived so far as grounded on the charges actually put in issue by her first suit; yet the waiver was not absolute, but conditional; the agreement being in the nature of condonation, which binds only on the footing of subsequent good conduct. Here, however, instead of good conduct following the agreement, the husband commits adultery; the wife's remedies thereupon revive; so that by the ecclesiastical law, which governs the Divorce Court, her title to redress is now as unquestionable as if the agreement had never taken place. In

(1) Under the 23 & 24 Vict. c. 144, s. 3, which gives a right of appeal to the House from the decisions of the Judge Ordinary *per saltum*.

support of these propositions, *Smith* v. *Smith* (1); *Keats* v. *Montezuma* (2); *Palmer* v. *Palmer* (3); and *Walker* v. *Walker* (4); were cited.

The Court below had admitted that Mrs. *Rowley* was at liberty to sue for adultery committed subsequent to the agreement; but this could only point at judicial separation, whereas she demanded divorce *à vinculo* on the two grounds of adultery and cruelty charged by her first Petition, and charged, with aggravations, by her second.

Mr. *Philbrick* for the Respondent:—

By the words of the agreement, "The Petitioner undertakes not to institute other proceedings in the Divorce Court." These plain words require no argument to fortify their import. The parties are bound by reciprocal obligation,—the husband undertaking to execute a deed of separation with the usual well-known covenants. He engages not to molest her, and she, on the other hand, undertakes to let him live in peace. This arrangement has no analogy or resemblance to condonation, of which the essence is forgiveness, and a renewal of cohabitation. Here there is no forgiveness on either side—and a renewal of cohabitation would not only have been inconsistent with the compact, but would have put an end to it (5). The true doctrine in such a case, is that wholesome one affirmed by the Judge Ordinary; that where the suit is derogatory to the marriage, the Court will favour an arrangement which prevents the scandal and opprobrium of a public investigation.

THE LORD CHANCELLOR (6), at the close of the argument, after stating the facts and examining the pleadings, expressed himself as follows:—

My Lords, the whole question, in this case, turns upon the meaning of the words in the agreement: "The Petitioner undertaking

(1) 4 Hagg. E. C. 509.
(2) 1 Sw. & Tr. 334; 5 Jur. N.S. 177
(3) 2 Sw. & Tr. 61.
(4) 2 Phillim. 153.
(5) *Macqueen* on Husband and Wife, p. 341. A great conveyancer invented the "five minutes clause," providing that if the husband and wife should at any time be together for five minutes after either of them had requested the other to depart, the deed of separation should instantly become void. No such clause, however, is required, as a renewal of cohabitation will of itself vacate the deed.
(6) Lord *Chelmsford*.

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not to institute other proceedings in the Divorce Court." It appears to me to be difficult to apply any other than one meaning to these words. It is not contended that they amount to an undertaking never to institute any other proceedings. But they seem to have been intended to prevent future proceedings in respect of matters forming the ground of a Petition for a divorce which had occurred prior to the agreement. The parties agreeing to live separate upon certain terms which had reference solely to the future,—it can hardly be supposed that they meant to leave it open to the wife to institute fresh proceedings upon unknown acts of adultery committed prior to the Petition, which might afterwards be discovered. The Appellant must be taken to have been acquainted with the extent of the redress to which she was entitled for the infidelity of her husband, and to have known that in order to obtain a dissolution of the marriage she must be able to prove his cruelty as well as adultery. She must have been aware of every act of cruelty which she could possibly have alleged against her husband upon the first Petition. And when she consented to a separation, and entered into an undertaking not to institute other proceedings in the Divorce Court, she must have known that future cruelty of her husband towards her being unlikely, she was by the agreement most probably limiting her remedy for any fresh adultery upon her husband's part, to a judicial separation.

The learned Judge Ordinary very properly rejected the supposed analogy between this case and a case of condonation. In the latter case there is a conditional forgiveness; here there was an absolute release.

I think the decree quite correct, and that it ought to be affirmed.

LORD CRANWORTH:—

The whole question turns upon these words at the end of the agreement, "The Petitioner undertaking not to institute other proceedings in the Divorce Court." Now, I concur with my noble and learned friend in thinking that those words must mean, not to institute other proceedings in respect of anything up to that time, not limiting it merely to those matters which had already been put in issue. That being so, it necessarily follows that inas-

much as she has now instituted proceedings founded in part upon something which occurred before that time, the suit cannot be sustained, and consequently the decree appealed from must be affirmed.

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*Order appealed from, affirmed; and appeal dismissed.*

Appellant's Solicitors: Messrs. *Brooks & Dubois.*
Respondent's Solicitor: Mr. *Charles J. Grattan.*

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JAMES WHITE *et al*. . . . . Appellants;

AND

THE DUKE OF BUCCLEUCH *et al*. . . . Respondents.

*Practice—Jurisdiction—Issues—Uncertainty—Right of way—Res judicata—Costs.*

1. Where proceedings are taken out of the ordinary *cursus curiæ* with the assent of the parties, all subsequent interlocutors in the course adopted, though pronounced adversely, are in the nature of awards, and not subject to appeal.

2. Where, in an action of declarator of right of way, the Defender had consented to judgment against him upon issues describing the footpath claimed as leading "by or near" a red line on a plan in process, the Court had subsequently directed an engineer to lay off the footpath so consented to "in such manner and such a line as to make the footpath least burdensome to the Defender."—*Held*, 1, That the Court, by so doing, had departed from the *cursus curiæ*. And, 2, That all the interlocutors following on that departure were extra-judicial and not appealable. 3. That the judgment was vague and uncertain in consequence of the alternative form of the issue "by or near." And 4. Affirming the judgment of the Court below, that a minute abandoning three out of five footpaths claimed in the summons, and lodged *before* closing the record, was irregular as a minute under the *Judicature Act*; and that it was too late to receive another minute in the same terms *after* closing the record, and after judgment upon the issues as to the other two footpaths had been given, although some conclusions of the summons were still undisposed of. 5. *Semble*, judgment of *absolvitor*, *quoad* the three roads, the right to which was never put in issue, would not be *res judicata* in another action to establish such right. 6. An appeal against interlocutors made after a departure from the ordinary course of the Court, dismissed *without costs*, the House being of opinion that the parties had been led astray by the Court below.

In 1846, the Appellants raised an action before the Court of Session against the late Earl of *Morton*, concluding *inter alia*, that it should be declared that the five roads or footpaths described in the summons, and lying between *Aberdour* and *Burntisland*, in *Fifeshire*, were public rights of way, and that the Defender should be ordained to remove obstructions, and interdicted from interfering with the free use by the public of the right of way. The Earl of *Morton*, by his defence, maintained that these footpaths were his private property, and not burdened with any public right

of way. On the 7th of March, 1851, before the record was closed, the Appellants lodged a minute, by which they abandoned the cause, in so far as related to three of the footpaths, reserving their right to bring a new action as to these, in terms of the *Judicature Act* (6 Geo. 4, c. 120), and the relative *Act of Sederunt*. Upon this minute being lodged, the Lord Ordinary (*Robertson*) appointed the Defender to give in an account of his expenses relative to the part of the cause abandoned, and remitted the same to the auditor to tax and report. On the 31st of May, 1851, the record was closed. Thereafter, the Court remitted to Mr. *Wylie*, a civil engineer, to make a plan of the ground, shewing the line of footpath claimed, and the places where the two branches thereof entered and left the Defender's ground. Mr. *Wylie* prepared a plan, on which the footpath claimed was delineated by a red line.

By interlocutor of the 18th of July, 1854, the Court approved of two issues, and appointed them to be the issues *for trying the cause*. The issue as to one of the roads claimed was as follows :—

1. Whether, for the said period of forty years, or for time immemorial, there existed a public right of way or branch foot-road for foot-passengers, leading by or near the broad red line, as shewn on the plan, No. 424, of process, from the *Kirk Wynd* of the old or easter village of *Aberdour*, in a southerly direction along the eastern side of what is known as the *Mill Meadow*, to or near the *Teinds' Barns*, and thence in an easterly direction through or betwixt a row or double row of old trees till it joins the pathway first above described at or near the *Heughs*, at or near the aforesaid northern extremity of the *Whitesands Bay*, and thence by that pathway to *Starleyburn*, and thence through the remaining portion of the Defender's lands to the kirkton of *Burntisland*, or to the harbour and royal burgh thereof.

The issue as to the other road claimed was in the same terms, *mutatis mutandis*.

Shortly before the day fixed for trial the Defender lodged a minute, by which he consented to a judgment against him in the same way as if a verdict had been found for the Appellants on the issues *in the cause*. Lord *Morton* thereafter presented a note craving, that, since the right of path had been conceded, it was necessary, for the protection of his property, that the footpaths should be judicially

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defined and laid off. The Court thereupon, by interlocutor of the 23rd of December, 1854, remitted the process, with the issues and the minute consenting to judgment, to Mr. *Wylie*, with directions to him "to lay off and mark on the ground, and also on the plan prepared by him, the footpath so consented to, with the entrances to the same, in such manner and in such line as to make the footpath least burdensome to the Defender, and so as to interfere as little as might be with the use and occupation of the ground by the Defender, and, at the same time, so as fully to answer the right of footpath between the places mentioned in the issues, and without interference with that line of way." Mr. *Wylie* made an interim report desiring instructions with reference to a proposed diversion of the footpath between the *Kirk Wynd* and the *Teinds' Barns*, mentioned in the issue, from the broad red line, as delineated on the plan therein referred to, on to a private cart-road belonging to the Defender, which ran parallel to the red line between a row of trees and a stone wall. The Appellants objected to this diversion, but the Court, by interlocutor of date the 10th of March, 1855, found that the Appellants were not entitled to a footpath separate from that cart-road. On the 29th of November, 1856, their Lordships approved of the final report and relative plan prepared by Mr. *Wylie*, on which plan the footpath between the *Kirk Wynd* and the *Teinds' Barns* was marked upon the cart-road; and found the Appellants entitled to the footpaths so marked on the plan.

The Appellants subsequently moved the Court to ordain the Respondents, against whom the action had been transferred on the death of Lord *Morton*, to remove certain obstructions from the footpath; but the Court, by interlocutor of the 6th of December, 1861, refused the motion (1).

In January, 1862, the Appellants moved the Court to dispose of the remaining conclusions of the summons, and to find them entitled to expenses. The Court, instead of dealing with this motion, ordered the parties to be heard on the competency of the Appellants' minute of abandonment, dated 7th of March, 1851; and their Lordships by interlocutor, dated the 21st of May, 1862, found that this minute was incompetent, and appointed it to be

(1) See *Hay,&c.* v. *Earl of Morton*; 24 Court of Session Cases (2nd Series) 116.

withdrawn, on the ground that it was lodged *before* the record had been closed, whereas to make it competent under the *Judicature Act* it should not have been lodged till *after* that step had been taken (1). To meet this view the Appellants lodged a new minute in precisely the same terms as the former. The Court, however, by interlocutor of the 6th of June, 1862, held that the Appellants were not entitled in the then state of the process to abandon in terms of their second minute; and found and declared, in terms of the declaratory and prohibitory conclusions of the summons, as regarded the footpaths laid down on Mr. *Wylie's* plan, and settled by the interlocutor of the 22nd of November, 1856, to be the footpaths to which the public were entitled: *quoad ultra* their Lordships *assoilzied* the Respondents, but found the Appellants entitled to certain expenses, which were modified to £750 by interlocutor of the 31st of March, 1863 (2).

The present appeal was taken against the interlocutors of the 10th of March, 1855, the 29th of November, 1856, the 6th of December, 1861, the 21st of May, 1862, the 6th of June, 1862, and the 3rd of March, 1863.

Mr. *Anderson*, Q.C., and Mr. *C. Grey Wotherspoon*, for the Appellants, argued that all the interlocutors appealed against were erroneous. The right of the Appellants to the footpath *in the red line* marked on the plan was judicially established by the Defender's minute of consent to a judgment, as if a jury had returned a verdict; and the Court, therefore, had no right or power afterwards to deprive them, or the public, of any portion of the footpath as they had done, by diverting that portion of the red line between the *Kirk Wynd* and the *Teinds' Barns* on to the cart-road. The cart-road was never claimed, and never conceded. The Appellants would not have accepted it in lieu of a corresponding portion of their red line; for, among other reasons, the cart-road was not in all circumstances a safe route, while the road by the red line was. The road so diverted was described in the issue by reference to the plan in process; that line, and that alone, should have been given to the Appellants.

(1) See *Hay, &c.* v. *Earl of Morton*; 24 Court of Session Cases (2nd Series) 1054.
(2) Ibid. 1056.

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[LORD WESTBURY: I observe that the second issue describes the footpath as situated "by or near" the red line. This is an issue which contains a vitious amount of uncertainty, and upon which no satisfactory judgment could have been pronounced by any Court.]

The alternative "by or near" was no doubt sanctioned by the Court, but this was to meet the case of any variation in the proof. By the Defender's concession, however, no proof was required; and the proper course, in those circumstances, was to have given the route as laid down by the red line. At all events, the footpath should not have been placed upon a dangerous, private, ill-kept, cart-road. In this matter it was submitted the Court had clearly acted *ultra vires*.

[THE LORD CHANCELLOR: Both *ultra vires* and *ex via*.]

Quite so; that was the way the Appellants desired to put it before their Lordships. The interlocutor of the 6th of March, 1855, pronounced upon Mr. *Wylie's* interim report, and which directed this diversion of the footpath, should, therefore, be reversed.

[LORD WESTBURY directed attention to the fact that the interlocutor of the 6th of March, 1855, followed upon that of the 22nd of December, 1854, by which Mr. *Wylie* was directed to lay off and mark on the ground, and also on the plan, the footpath *in such a line as to make the footpath least burdensome to the Defender*, and inquired whether that interlocutor of 1854 was not the basis of those which followed, as to the diversion of the footpath, and must not be taken to involve a consent by the parties to the departure from the strictly judicial duty or functions of the Court; and that, if that were so, whether there had not been a departure from the *cursus curiæ* by the parties, which rendered any appeal against the subsequent relative interlocutors incompetent.]

Their Lordships would observe that the interlocutor of 1854, in addition, stated that the line to be laid down was "the footpath so consented to," which surely meant the red line. The Appellants most certainly never intended to consent to anything that might deprive them of a footpath by the red line. They urgently protested at the time against any generosity being shewn to the noble

Defender by laying down any other footpath than the one they had gained. But, again, the interlocutor of 1854 merely contained directions to Mr. *Wylie*. It could not injure the Appellants till acted upon; and the Appellants had appealed the interlocutor, which judicially declared the alteration of the footpath. That was the interlocutor by which the Appellants were aggrieved. It was a judicial act, and was competently brought up by the appeal. It might have been that the red line would have been considered by Mr. *Wylie* to be the least burdensome to the Defender; in which case the Appellants would have had no reason to complain of the interlocutor of 1854. It was clear neither party, for a moment, thought that the Appellants had consented to take anything but the red line, or that there should be a departure from the *cursus curiæ* in the mode of disposing of the case. There was not the slightest indication of such a view in the Respondent's printed case presented to their Lordships. The Court had also erred in refusing to order the removal of obstructions.

Then as to the abandonment of the three roads. The minute of 4th of March, 1851, was, no doubt, lodged three months before the closing of the record; but, if bad on that account, as a minute under the *Judicature Act*, it was, at all events, good as an abandonment at common law; *Caledonian Iron Foundry Company* v. *Clyne* (1); *Shands'* Practice (2). The Lord Ordinary had not, it was true, pronounced in terms the usual interlocutor receiving the minute of abandonment; but, in effect, he did the same thing by appointing the Defender to lodge his account of expenses "*relative to the part of the cause so abandoned.*" The Defender had acquiesced for eleven years in that abandonment; the Court itself had impliedly confirmed it by approving the issues, which related solely to the remaining two roads, "as the issues for trying *the cause*;" although, at the last moment, their Lordships started and sustained the objection to the minute of 1851. The Defender could not take advantage of this objection after such a long acquiescence: *Elliott* v. *Sir J. L. Johnston's Trustees* (3). But, even if the minute of 1861 was bad, the minute of 1862, lodged long after the record was closed, and before the cause was disposed of, was good.

(1) 10 S. & D. 133. (2) Vol. i. p. 494.
(3) 1 S. & D. 51, affirmed, 2 Shaw's Appeal Cases, 461.

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At the conclusion of the argument for the Appellants, their Lordships, after consultation, desired the Counsel for the Respondents to confine their argument to the question of abandonment.

Mr. *Rolt*, Q.C., and Mr. *Hall* (of the Scotch Bar), for the Respondents, argued that both the minutes of abandonment were properly disregarded by the Court below. The minute of 1851 was bad under the *Judicature Act*, because it was lodged *before* the record was closed. It was also bad at common law, because it had not been followed by the usual interlocutor, declaring it to have been received. The minute of 1862 was made too late. The record contained all the conclusions and allegations applicable to the five roads; so when the Court came finally to dispose of the case, there was no other course open to them than to give a declaration as to the two footpaths conceded by the Respondents, and to assoilzie as to other roads claimed. This branch of the case was purely one of practice, and their Lordships would be slow in such a matter to interfere with the ruling below.

Mr. *Anderson*, Q.C., replied.

THE LORD CHANCELLOR (1):—

My Lords, this is an appeal against six interlocutors of the Second Division of the Court of Session, and, in the course of the argument, your Lordships indicated a very strong opinion that, as to four of them, the appeal was incompetent.

The Court below had no power whatever to direct a road to be laid out equally convenient with that to which the public were clearly entitled. They have not given the public any way which they had been accustomed to use; but they have consulted the convenience of the Defender, and they have directed Mr. *Wylie* to ascertain a road which will be equally convenient to the public with that to which they were entitled, and not inconvenient to the Defender.

There is no doubt whatever, therefore, that in this interlocutor, the Court having proceeded *ultra vires*, all the subsequent interlocutors which were founded on this, as their basis, were taken out of the judicial course, and, consequently, were not a subject of appeal.

(1) Lord *Chelmsford*.

The only remaining question, therefore, relates to the question as to the minute of abandonment, upon which, undoubtedly, there appeared to be some difficulty during the course of the argument, but it is one which, on consideration, it seems to me may be very easily determined. The minute that was originally given in on the 4th of March, 1851, was in these terms: "*Deas*, for the Pursuers, stated that he abandoned the cause in so far as it related to the rights of way or footpaths described in Articles 2nd, 3rd and 5th of the revised condescendence, reserving the Pursuer's right to bring a new action relative to the roads and portions of the cause thus abandoned, in terms of the statute 6 Geo. 4, c. 120, and relative *Act of Sederunt*, without prejudice to the Pursuer's right to proceed with the said cause as regarded the whole other matters and roads involved therein as accords." Upon that there was an interlocutor by the Lord Ordinary of the 7th March, 1851, in these terms: "The Lord Ordinary, having considered the minute by which the Pursuers abandon this cause in part, appoint the Defender to give an account of expenses relative to the part of the cause now abandoned, and remits the account thereof, when lodged, to the auditor to tax the same and to report, and *quoad ultra* continues the cause till to-morrow."

Now it must be observed, in passing, that that minute of abandonment was never perfected, because, according to the practice which is laid down in Mr. *Shand's* book (1) (a book of authority), there should have been a payment of the expenses which the Lord Ordinary directs to be ascertained. And the next step to be taken by the pursuer should have been to obtain an interlocutor of the Lord Ordinary, that "in respect the expenses due to the Defender had been paid, allows the Pursuer to abandon this cause, dismisses the action, and decerns, with the expense of extract." Nothing of that kind was done, and, therefore, at the time of the closing of the record, which was on the 31st of May, 1851, there was no complete abandonment of these causes of action.

A new minute was given in, the date of which is the 26th of May, 1862, exactly in the terms of the former minute of 1851. Now it may be observed, with regard to the new minute, that it was only under this statute of the 6 Geo. 4, that such a

(1) Practice of the Court of Session, p. 343.

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minute could have been given in at that time, when the record was closed, and the statute of the 6 Geo. 4 only gives power to Pursuer to abandon the whole cause of action. But this was an abandonment only of a part of the cause of action, and, therefore, on that ground, as it appears to me, it was incompetent.

But the Court deals with both these minutes of abandonment. First of all, in a judgment of the 21st of May, 1862, with regard to the first, the minute of 1851, the Lord Justice *Clerk* says it "contains an incompetent proposal," which I understand to mean that it was incomplete—that it was a mere proposal—that it was never carried into effect by a proper allowance of the abandonment after the payment of the expenses. And the rest of the Judges are of opinion that an abandonment of an action under the statute (and this professes undoubtedly to be an abandonment of the action under the statute) is only competent after the record is closed.

Now, my Lords, without entering into a consideration of whether there can be a part abandonment of a cause, or whether there can be an abandonment of a cause before the record is closed, I think your Lordships may decide in favour of these interlocutors upon a distinct and specific ground which is applicable to this particular case. The minute of abandonment of March, 1851, was incomplete, as I have shewn, at the time when the record was closed; but the record was closed in these terms on the 31st of May, 1851: The interlocutor is, "Declares the record to be closed on the adjusted revised condescendence for the Pursuer, No. 9, and the adjusted revised answers, No. 50, of process." Now, my Lords, there can be no doubt at all that the record was closed with respect to the five roads stated in the revised condescendence, and forming, therefore, part of the record; and that it was absolutely necessary for the Court to dispose of those claims upon the record which were made by the Pursuer, because they were not withdrawn from the record. Although, practically, the case was confined to the trial of the issues with regard to two of the roads, still those claims remained on the record, and it was absolutely necessary for the Court to dispose of them. Now, in order to dispose of them, the Court considered it necessary, first of all, to direct the minute of March, 1851, to be withdrawn, and afterwards, in their interlocutor of the 6th of June, 1862, to find that the Pursuers were "not

entitled to abandon in terms of the said minute." These minutes being out of the question, the claims as to those three roads had to be disposed of; and the only mode in which they could possibly be disposed of, as there was no evidence in support of them, and as they were not withdrawn, was to enter an absolvitor for the Defender, and therefore the Court directed that absolvitor to be entered.

I was a good deal struck by the observations which were made by my noble and learned friend (Lord *Westbury*), in the course of the argument, as to the danger which might arise to the public supposing this interlocutor were to stand, with an absolvitor of the Defenders, because it might then be said that that would entirely conclude the public against any future claim with respect to these rights of way. I have very great doubts whether that would be the effect of it. Supposing any future claim to be made in respect of these roads, I doubt very much whether the public would be concluded by this interlocutor. I think it would be quite competent to the party prosecuting such a claim to shew the circumstances under which that interlocutor was pronounced; and, undoubtedly, if the circumstances could be shewn, it never could be said that it was binding against the public.

Under these circumstances, I submit to your Lordships that this interlocutor is perfectly correct. But a question may arise as to what ought to be done with the costs in this case. It appears to me (I say it with very great deference to the learned Judges) that they have led the parties completely astray. They ought not to have gone on judicially to pronounce those several interlocutors which have been declared to be incompetent. They unnecessarily, and, as I venture to say, improperly, kept the parties before them, when the parties themselves had proceeded in a way which took the case out of the jurisdiction of the Court. Under these circumstances, I submit to your Lordships that, in dismissing this appeal, we ought to dismiss it without costs.

LORD CRANWORTH:—

My Lords, I entirely concur with my noble and learned friend in the conclusion at which he has arrived in this case. When the jury had returned a verdict (for we must consider it as if they had

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returned a verdict) that there was a right of way "by or near the red line," it was patent that the Court had got a finding that *per se* could not be applied. How were the Court to deal with this? It is not necessary for me to say: indeed I should feel myself at a loss to say exactly what, according to practice, ought to have been the course pursued. It is plain that issues have been directed which did not exhaust the subject. How was that to be supplied?

The best way to put it for the Appellants is this, to treat it as a finding, as no doubt it was a finding, that there was in some direction or other a public right of way from the one point to the other. That was found by the jury. The precise line was not found. I do not say that it was open to the Court, but, perhaps, it was open to them, to have them put in some course of inquiry, either by reference to Mr. *Wylie*, or by some other mode, to ascertain what was the course of the public right of way, whether along the red line, or if not along the red line, how far, and in what direction diverging from it. If that had been done, whether it was the proper course or not, it might have led at least to an ultimate finding upon that which was the point really to be decided—namely, what was the line of the public right of way; if that had been done, I think if an interlocutor had been made upon that subject, it might have been right, or it might have been wrong, but it would have been upon a totally different footing for us to consider from what it is at present. But what the Court did was to direct an inquiry, which upon no possible ground could they have a right to direct—namely, an inquiry, or rather a reference to Mr. *Wylie*, telling him, not to ascertain what the line was, but to make out a new and convenient line, as little as possible burdensome to the Defender. That might be, by way of arrangement, an extremely convenient course to pursue: but it immediately took the whole proceeding out of the ordinary *cursus curiæ*, and therefore it was incompetent afterwards for the parties to appeal against anything that was done in pursuance of that reference. That is the ground upon which my noble and learned friend has rested his view of the case upon the merits, and I entirely concur with him in the conclusion which he has arrived at on this, the first point in the case.

My Lords, with regard to the second point, it has always been the rule of your Lordships' House to be as slow as possible to interfere with anything that is mere practice. What really was the case here was this:—The parties having entered this minute of the 4th of March, 1851, abandoning the cause *quoad* the three roads, the record is afterwards made up containing the whole of the condescendence and the whole of the answers, embracing all the five roads. I fully enter into the feeling of the Court, therefore, that when the cause came finally to be disposed of, and they were bound to make a deliverance as to the whole, it was necessary for them to treat the record as they found it; and the result being in their view that there was a proper finding, or a proper disposal of the case as to the two roads, but no proof at all having been given as to the three other roads, the absolvitor was a necessary consequence.

I confess, I do not feel apprehensive as to any effect which this decision will have upon any of the public who may hereafter assert such a right; because I consider that it is perfectly clear that, even if such a decree as this can be given in evidence, it can be conclusive only if, upon the face of it, it shews that there has been an adjudication. But upon the face of this decree it would appear that there has been no adjudication.

I also think that the proposal which my noble and learned friend has made to your Lordships, with regard to the costs of this appeal, is a right one, because, after all, it is an error on the part of the Court which has led the parties into taking the course which they have taken. Therefore I concur with my noble and learned friend that the appeal should be dismissed without costs.

LORD WESTBURY:—

My Lords, I entirely concur in the conclusions at which my noble and learned friends have arrived. From the moment that the consent of the parties to a verdict, and afterwards to a judgment, upon the inartificially framed issue, was substituted for a regular proceeding, this cause was taken out of the ordinary and regular course of judicial procedure. No doubt, the original issue was inartificially framed; but it contained within it materials for answering by the jury two questions—one, whether there was a

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road along the red line; the other, if not along the red line, whether there was a road along any other and what line.

The verdict that was taken by consent, or rather the judgment, was a simple affirmative to that issue; an affirmative, therefore, which could not be applied to either one of the questions. In reality, the issue ought to have been directed to be tried, and the insufficiency of the consent ought to have been observed. But, instead of that, the Court have endeavoured to correct the error, and to supply the defect by taking a course which certainly was not within their judicial authority; but which not having been complained of by either party, must be attributed entirely to the consent of the parties. What the Court did was embodied in the interlocutor of the 22nd of December, 1854: and that is certainly not a deliverance in pursuance of any judicial power; it is nothing in the world more than an embodiment of certain terms which may have been approved of by the Court, and which appear to have been acquiesced in by the parties.

Now that was the basis of all that was subsequently done; a basis constituted of the consensus of the parties, and not of the exercise of any judicial authority. It is impossible to interfere with that; it rests upon matters which are not brought before us, and which we cannot remove. Therefore, that standing, all that subsequently follows is an emanation of the original agreement to take this matter out of the ordinary path of judicial determination. On that ground therefore, my Lords, the appeal is wholly incompetent; or rather, it is one which we are incapable of entertaining. We cannot apply the ordinary rules of law to proceedings based on an order which is utterly at variance with the ordinary rules of law.

Now, with regard to the other point, undoubtedly I entirely concur in this, that full credit must be given to the Judges of the Court below with regard to a mere matter of practice, unless we are enabled to ascertain, in a manner which admits of no possible doubt, that there has been a miscarriage in the application of their rules of practice; but in this respect, though originally I felt some anxiety and doubt on the point, I am now satisfied that there has been no miscarriage in point either of substance or of form. It was undoubtedly competent, I apprehend, by the law and prac-

tice of *Scotland*, to the Pursuer, anterior to the closing of the record by minute, and also by amendment, to have restricted the conclusions of the summons in his action, provided that minute was so dealt with by the Pursuer as to become an irrevocable thing, and to accompany the summons in such a manner as that, when the record was closed, it might plainly appear to be closed upon that restricted summons. But, without entering further upon that, what was done by the Appellant was different from that course of procedure altogether. It is true he delivered in a minute in March, 1851, to which I abstain from giving any kind of designation, because there has been a controversy as to whether it contains the necessary elements of a minute of restriction or not; but even if it was a minute of restriction, the course taken by the Appellant afterwards was one which certainly justifies the form of the interlocutor which was finally pronounced, because it is plain that the Appellant thought proper to demand judgment upon the summons, which, so far as the closed record is concerned, appears to be unrestricted upon the whole of the pleadings, which pleadings were addressed to the five rights of road that were the subject of the original cause of action. The result was, that, as the record so made up and closed, unquestionably the Defender was entitled to an absolvitor from that which was disproved, and from that also which had been abandoned.

My anxiety at first was, lest the form of absolvitor should involve in it an apparent conclusion that the question had been tried and determined on its merits; but I think we ought not to permit any doubt of that kind to interfere with the ordinary form of judicial expression of interlocutors in *Scotland*, because I must take it for granted that these interlocutors are so worded that the real truth of the nature of the absolvitor might easily be ascertained upon an examination of the interlocutor, or of the matters on the record, in a process to which that interlocutor would naturally open the door for investigation or proof.

On these grounds, therefore, my Lords, I entirely concur with my noble and learned friend, that there is no reason to alter the form of the interlocutor in that respect; and that this appeal must fail. But inasmuch as it fails in consequence of there having been a common understanding to pursue a path which was a by-path,

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and not the ordinary judicial high-road, I think, as that has been the result of agreement, it would be hard to dismiss this appeal with costs by reason of our being incompetent to deal with matters which both parties seem to have supposed that we should be competent to deal with. Therefore I approve entirely of the motion, proposed by my learned friend to be submitted to your Lordships, that the last interlocutors should be affirmed and the petition of appeal dismissed without costs.

*The following question was then put:—*

That the interlocutors of the 21st of May, 1862, the 6th of June, 1862, and the 28th of February, 1863, be affirmed, and the appeal dismissed, without costs.

LORD WESTBURY:—

Would your Lordships allow me to suggest that our intention is to affirm those interlocutors which discharge the minute, and grant the absolvitor? But inasmuch as it is not competent to the House to entertain the appeal upon the first interlocutors, it would be incompetent to the House to affirm those interlocutors. I would, therefore, with submission to your Lordships, suggest that your Lordships should dismiss, without costs, the appeal as to all the interlocutors, except the interlocutors discharging the minute, and granting the absolvitor, but affirm those last interlocutors, the appeal in respect of those interlocutors also being dismissed without costs.

LORD CRANWORTH:—

I think that would be very much the effect of the question as it was put by my noble and learned friend on the woolsack. The principle is, that we do not affirm those interlocutors which we think were grounded upon the original interlocutor of December, 1854, which took the case out of the common *cursus curiæ*. We do not reverse them, and we do not affirm them. We are not competent to deal with them.

LORD WESTBURY:—

Those interlocutors were emanations from the consent of the

parties, and from the consent of the parties alone can they derive any authority; therefore they are not affirmed.

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THE LORD CHANCELLOR:—

I believe the result of the way in which I put the question to the House is precisely what your Lordships have suggested, namely, that we take no notice at all of those interlocutors upon which the appeal is incompetent, but, with regard to the other interlocutors, we affirm them, and dismiss the appeal without costs in respect of the whole.

*Certain Interlocutors affirmed, and Appeal dismissed, but without costs.*

Solicitors for the Appellants: *Simson & Wakeford.*
Solicitor for the Respondents: *William Robertson.*

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THE LORD ADVOCATE OF SCOTLAND . APPELLANT;
AND
JAMES HUNT . . . . . RESPONDENT.

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*Feb.* 11.

*Prescriptive Possession under the Act of* 1617, *c.* 12—*Parts and Pertinents*—*Regalia.*

To be effectual, prescriptive possession must begin with a title, and must continue under it for forty years.

The title originally may have been infirm or invalid, but by the required possession for forty years all challenge and impeachment are excluded.

What is alleged to be "part and pertinent" must be shewn to have been possessed *as belonging to* the principal estate. Mere contemporaneous occupation will not suffice.

The onus of proof is on the party who sets up the claim.

Discontiguity, *per se*, is not a bar.

The Royal Palace of *Dunfermline*, claimed by the Respondent as "part and pertinent" of his Barony of *Pittencrieff*, and possessed by him for forty years, but without any initiatory grant or title:—

*Held* (reversing the decree below), to be the property of Queen *Victoria* and her royal successors.

THE suit was instituted in January, 1854, by the Lord Advocate of *Scotland* (1), on behalf of the Crown, and of the Commis-

(1) Mr. *Moncreiff.*

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sioners of Woods, Forests, and Land Revenues, in order to have it found and declared that the ancient royal palace of *Dunfermline*, in the county of *Fife*, with the ruins and grounds thereof—possessed by the Respondent, Mr. *Hunt*—belonged to, and formed part of, the patrimony and property of Her Majesty Queen *Victoria*.

Mr. *Hunt* resisted the demand, alleging that the palace was "part and pertinent" of the barony of *Pittencrieff*, his property, and that he had possessed it as such "part and pertinent," for forty years, so as to satisfy the requirements, and give him the benefits, of a prescriptive title under the Act of 1617, c. 12 (1). The Lord Ordinary (2) decided against Mr. *Hunt*, but the First Division of the Court of Session, on the 31st of January, 1865, gave judgment in his favour, holding that, for more than forty years, Mr. *Hunt* and his predecessors had, by virtue of charter and seisin, possessed and enjoyed, as their own exclusive property, the palace, ruins, and grounds in question, as part and pertinent of the barony of *Pittencreiff*.

Against this decision the Lord Advocate appealed to the House, and the case was fully argued last session, when the then Attorney-General (3), Mr. *Anderson*, Q.C., and Mr. *Ivory*, appeared as counsel for the Appellant.

They admitted the forty years' possession, but contended that, by the law of *Scotland*, this of itself was unavailing: there must be a written title. A clause "of parts and pertinents," even in the case of a barony, and although accompanied by possession, would not do, unless it were shewn that the property claimed had been possessed as parcel of the barony and appertaining to it. The onus of proof was on the Respondent, and he had given no proof to establish anything beyond the naked fact of an unexplained possession. His title deeds negatived his claim. So far from shewing that this palace ever formed "part and pertinent" of his barony, they shewed the contrary. Not an inch of the property now in question touched the land of the barony. Lands not belonging to it are interposed on all sides;—a circumstance which,

(1) Another point relied upon by Mr. *Hunt* is not here stated. For the reason of omitting it, see the opening of the Lord Chancellor's Speech, *infra*, p. 88, and see the very full Report of this case as decided below. 3rd Series, Court of Session Cases, vol. iii. p. 426.

(2) Lord *Mackenzie*.

(3) Now Lord *Cairns*.

though not conclusive against Mr. *Hunt's* claim, strengthens the presumption against it. In addition to these arguments, the Appellant's counsel urged that this palace came within the category of the greater regalia, and could not have been conveyed without express specification. They cited the following authorities: viz. *Stair* (1); *Erskine* (2); *Young* v. *Carmichael* (3); *Countess of Moray* v. *Wemyss* (4); *Earl of Stair* v. *King* (5); *Bell's* Prin. (6); *Napier* on Prescription (7); *Menzies'* Lectures (8); *Scot* v. *Ramsay* (9).

Sir *Roundell Palmer*, Q.C., and Mr. *Lee*, on behalf of the Respondent:—

The Act of 1617, c. 12, was for quieting the enjoyment of property. Its policy was to exclude inquiry where forty years' possession was complete. The Sovereign especially was not to disturb the title in such a case. The palace here had, perhaps, been better cared for than if it had been in the hands of those who act for the Crown. The title required for prescription need not originally be valid. An express grant is not required. By possession even radical defects are cured, it being no longer competent to insist on them. Discontiguity is no objection. Even regalia may pass as part and pertinent of a barony. The following authorities were relied upon: *Stair* (10); *Erskine* (11); *Duke of Montrose* v. *McIntyre* (12); *Rose* v. *Ramsay* (13); *Mackenzie* v. *Mackenzie* (14); *Countess of Moray* v. *Wemyss* (15); *Ross's* Leading Cases (16).

The case stood over till the 11th of February, 1867, when judgment was pronounced.

THE LORD CHANCELLOR (17):—

My Lords, this suit was originally an action of reduction and declarator, impeaching the Respondent's title to a larger portion

(1) 2, 3, 73.
(2) 2, 63, and 3, 7, 4.
(3) Morr. 9636.
(4) Morr. 9636.
(5) 5 Bell, App. Ca. 82.
(6) § 2020.
(7) Page 277.
(8) Pages 527, 545.
(9) 5 Sh. Dun. & Fac. Coll. 5 Feb. 1787.
(10) 2, 3, 60, 61, 73, and 2, 12, 8.
(11) 3, 7, 4.
(12) 10 Dun. 896.
(13) M. 9645.
(14) 6 Patton, 676.
(15) M. 9636.
(16) Vol. iii. pp. 316, 338.
(17) Lord *Chelmsford*.

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of ground than that which was afterwards the subject of dispute. In the progress of the litigation the claim was limited to the having it "found and declared that the Respondent had no legal right or title to the Royal Palace of *Dunfermline*, or to the ruins thereof, or to the ground whereon the same was situated and immediately adjacent thereto."

The pleas in law of the Respondent state separately and distinctly the express conveyance, by description of boundaries, and the possession as part and pertinent of the Barony of *Pittencrieff*.

The case, however, is narrowed down to the latter ground of defence, that of "part and pertinent;" for, according to the opinion of all the Judges, the right founded on the express or special title is entirely out of the question; so that the only title upon which the Respondent can found himself is the possession of the ground, upon which the ruins of the palace stand, for forty years as part and pertinent of the Barony of *Pittencrieff*. Of the possession of the ground for more than the requisite number of years there is no doubt; and the only question is, whether the Respondent can shew a *habile* title to which that possession can be lawfully ascribed.

The statute respecting prescription of heritable rights, passed in the Scottish Parliament of 1617 (1), shews clearly the possession

(1) "The Act of 1617, c. 12, statutes and declares, "that whosoever His Majesty's lieges, their predecessors and authors, have brooked heretofore, or shall happen to brook in time coming, by themselves, their tennents, and others having their rights, their lands, baronies, annual rents, and other heritages, by vertue of their heritable infeftments made to them by His Majesty, or others their superiours and authors, for the space of forty years continually and together following and ensuing the date of their said infeftments, and that peaceably, without any lawful interruption made to them therein during the said space of forty years, that such persons shall never be troubled, pursued, nor inquieted in the heritable right and property of their said lands and heritages foresaid by His Majesty, or others their superiours and authors, their heirs and successours, nor by any other person pretending right to the same by virtue of prior infeftments, publicke or private, nor upon no other ground, reason, or argument competent of law, except for falsehood, provided they be able to shew and produce a charter of the said lands and others foresaids, granted to them or their predecessors by their said superiours and authors preceding the entry of the said forty years' possession, with the instrument of saising following thereupon, or where there is no charter extant, that they shew and produce instruments of saising, one or more, continued and standing together for the said space of forty years, either proceeding upon *retour*, or on precept of *clare constat*." The whole of this extract was read by the Lord Chancellor as part of his address.

which was meant to be protected. The Act describes it as a possession which must *begin with a title*, and which must endure "for the space of forty years continually and together following and ensuing the date of the infeftments." The title under which the possession commenced may have been an infirm and invalid one, but if the party can shew that he has possessed the subject of the infeftment for forty years, he is safe from all future interruption. The subject claimed need not be expressly mentioned in the charter. It may be comprehended within the terms "parts and pertinents." But in such a case it will not be sufficient to prove that the alleged pertinent has been occupied with the principal subject; it must be occupied as belonging to such subject; for when the statute says that the parties must be "able to shew and produce a charter of such lands and other foresaids granted to them," it seems clear that something more is necessary to be proved than a joint possession of the principal subject of the charter with that which is alleged to be part of or pertinent to it.

Some objections were made, on the part of the Appellant, to the possibility of the ground in dispute being part and pertinent of the Barony of *Pittencrieff*.

It was said, in the first place, that its discontiguity from the barony rendered it incapable of becoming pertinent. As far as I understand the map, the ground in dispute in no part touches the Barony of *Pittencrieff*. But whether the intermediate land belongs to a different owner, or to the same owner under a different title, is quite immaterial, for it is clear from the text writers, and also upon the authority of decided cases, that discontiguity is no objection to a subject becoming part and pertinent, even where it is included in the titles of another party. Of course, in such cases the *primâ facie* presumption will be against the claim, but it may be overcome by sufficient evidence.

Another objection, urged by the Appellant, was, that a royal palace cannot be prescribed for against the Crown. It is denied on the part of the Respondent that this ever was a royal palace. But it appears to me that the view of the Appellant is the more correct one.

The Lordship of *Dunfermline*, in which the palace and ground adjacent was included, belonged originally to the Monastery of

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*Dunfermline*, and was annexed to the Crown on the dissolution of that monastery, in 1593. The lordship was afterwards granted by King *James* to his Queen (*Anne* of *Denmark*), and the heirs of the marriage; whom failing, to the King's heirs and successors in the Crown of *Scotland*. *Charles* I., when Prince of *Wales*, was infeft as heir of the marriage; but when he came to the throne, it must have been considered that the *dominium utile* of the lordship became consolidated with the superiority belonging to the Crown, for thenceforth it appears to have been regarded as Crown property. Perhaps the best proof of this is, that after the Revolution, King *William* and Queen *Mary*, with consent of Parliament, granted a tack (1) of the Lordship and Royalty of *Dunfermline;* and in the dispositive clause, after the general words, these are added, "which may pertain, or are known to pertain, to their Majesties, or to their royal grandfather as lord of the said Royalty and Lordship of *Dunfermline*, by any manner of way, or which did ever at any time bygone pertain to their Majesties' dearest grandmother as Lady of *Dunfermline*, or to King *James* VI. of blessed memory, by any Acts of Parliament, or otherwise howsoever, or to the Abbot's convent and monastery thereof of old."

But, assuming that the ground in dispute was *inter regalia*, it does not appear to me that this would be any conclusive objection to the Respondent's prescriptive claim, although it might render proof of it much more difficult. It was quite competent to the Crown expressly to annex the piece of ground on which the palace stood, to the Barony of *Pittencrieff* upon its creation, but I very much doubt whether property of the Crown could pass under the general words of "parts and pertinents" to a principal subject with which it had never been previously connected. But, waiving the consideration of this point, and assuming the right of the Respondent to prescribe against the Crown, and considering the Respondent's title to the Barony of *Pittencrieff* as the only *habile* title upon which his claim can be founded, I proceed to examine the different charters and instruments relating to that barony, so far as they bear upon the question of the ground in dispute being part and pertinent of it.

It is quite clear that the palace did not originally belong to the

(1) A long lease.

Barony of *Pittencrieff*, but was within the Lordship of *Dunfermline*, which was part of the possessions of the Monastery of *Dunfermline*. We must, therefore, look to some period subsequent to the creation of the barony for the origin of the alleged relation to it of the piece of ground in question. But, on referring to this later period, it will be found that the palace was dealt with by various charters long after the date of the creation of the barony, and that in all the subsequent charters dealing with the barony, when annexations to it were made, they were always specifically mentioned. For instance, in a charter of 1675, the Crown grants "the Barony of *Pittencrieff*, with the addition of the fourth part of the lands of *Newlands*, and five acres of land called *Newrancroft*, now annexed and incorporated into one entire barony, in all future time to be called the Barony of *Pittencrieff*."

In the charter of 1687 the marsh lands of *Pittencrieff* are stated to be parts and pertinents of the barony. The piece of ground in question never became part of the barony, but is named in subsequent charters as distinct and separate from it, down to the Crown charter of resignation in favour of *James Hunt*, in 1816.

Now, it is scarcely possible to believe that the palace and ground ever were made part and pertinent of the Barony of *Pittencrieff*, because not only is each addition to the barony expressly mentioned, but those lands which were acquired from time to time, and were never annexed to the barony, are always described as being separate from it; and it is inconceivable that no mention should have been made of such an acquisition as the palace. More especially does this seem remarkable, as in some of the charters it is considered of importance enough to be descriptive of a boundary "*juxta palatium de Dunfermline*."

But, then, it is urged by the Respondent that there having been originally a render of a red rose for the Barony of *Pittencrieff* in the later charters, when all the additions had been made to the barony, and the several other subjects were occupied with it, the whole together were united in the single *reddendum* of a red rose. I confess that I do not see the importance of this argument unless it can be assumed (which is the question to be decided) that the palace had in some way become part and pertinent of the barony.

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A close examination of the charters leads me to the conclusion that they have a negative and excluding force with respect to the palace being part and pertinent of the barony. And the case of *Scott* v. *Ramsay* (1) seems a strong authority in favour of the Appellant. There the piece of glebe land in dispute was entirely surrounded by the Defender's Barony of *Gogar*, and had been possessed with the barony, and no doubt as part of it, for upwards of seventy years. But it appearing that although a former owner of the barony had agreed with the Presbytery of *Edinburgh* to purchase this glebe at an annual feu duty of £4, and although the owners of the barony had possessed the glebe and paid the feu duty for the long period mentioned, yet inasmuch as it appeared that there was no infeftment made of the glebe, no *habile* title existed to which the possession could be ascribed, and the Pursuer consequently prevailed.

So in the present case, the Respondent is unable to shew a charter of the ground in dispute, or to prove that it was ever held as part and pertinent of the Barony of *Pittencrieff*. He therefore fails to defend himself against the claim of the Crown; and I am compelled to come to the conclusion that the interlocutor appealed from must be reversed.

LORD CRANWORTH:—

My Lords, it must be taken as a fact that the Respondent and his predecessors had been, before the raising of the action for more than forty years in the undisturbed possession of the land in dispute. The only question therefore is, whether he can shew a valid title by which that possession can be supported.

The express or special title was not the title relied on at your Lordship's bar, any more than in the Court below; and I therefore proceed to consider the other title put forward, namely, that this piece of land, the site, in fact, of the ancient palace of *Dunfermline*, has for more than forty years been held and enjoyed by the Defender and his predecessors as part and pertinent of the Barony of *Pittencrieff*.

When that barony was created, it certainly did not comprehend the Palace of *Dunfermline*, which in fact formed part of the Lord-

(1) 5 Shaw & D. 340.

ship of *Dunfermline* granted by King *James* the Sixth, and confirmed by Parliament to *Anne* of *Denmark*, and the heirs of her body by the King. Queen *Anne*, reciting her title to the palace as part of the Royalty of *Dunfermline*, by charter, dated the 15th of February, 1596, and confirmed by Parliament, granted the office of guardian or constable of the palace to the Earl of *Tweeddale*, and the heirs male of his body. This office continued to exist and to belong to the Earls of *Tweeddale*, and by a royal charter of the 14th of February, 1669, was made part of the tenandry of the *Grange* of *Dunfermline*, then granted and confirmed to the then earl, his heirs, and assigns. The office is described in the charter as the hereditary office *constabulariæ et custodia palatii nostri de Dunfermline*. From which it is plain that the palace was not then part or pertinent of the Barony of *Pittencrieff*—it still was a royal palace.

The question is, therefore, reduced to this: has the Respondent shewn that between 1669 and 1803, the date of the charter under which he claims title, this piece of land, on which are the ruins of the palace, has ceased to be the property of the Crown, and has it become part and pertinent of the Barony of *Pittencrieff*.

The law of *Scotland* requires, in order to establish a title by prescription, not only that the party insisting on it shall prove possession for the required period, but also that he shall shew a proper feudal title on which his possession has rested. Now here, I think, the Respondent has failed to shew any such title. I do not doubt the correctness of the doctrine that possession of land for the required period may found a title by prescription, as well by shewing title to a barony with parts and pertinents, as by shewing a bounding title including expressly, and by name, the lands in question. But then the person relying on such a title must shew not only that he has possessed the lands in question for the required period, but further, that he has held them as part and pertinent of the barony. The description *part and pertinent* of the barony is but a compendious mode of describing what might have been described by setting out the boundaries; and when it has been ascertained that these words have been used in a charter to designate particular lands, the legal consequences will be the same as if the lands had been described by metes and bounds.

The question is, whether the enjoyment relied on has been

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an enjoyment founded on the land being part and pertinent of the barony, or on some other title, or on no title whatever. The onus of proof is on the person setting up the title. It is for him to shew that he has been holding that which is in dispute as being part and parcel of the barony; and it is plain that whether he succeeds in shewing this must depend on all the circumstances of the case. No general rule can be laid down as to what is or is not sufficient to establish such a case by evidence. Here the only facts relied on are, first, that the place in dispute has, for more than forty years, been inclosed with and treated as part of the policy (1) of *Pittencrieff;* and second, that unless it has been held as part and pertinent of the barony it has been held without any title at all.

The last point may be disposed of at once. If to suppose that the place in question had been held without any title at all, merely by usurpation, could be treated as a *reductio ad absurdum*, there would be great force in the argument. But so far from this being the case, it appears to me, as it did to Lord *Deas* (2), to be extremely natural that, as the palace had become a ruin, and as it had long ceased to be a royal residence, nothing could be more probable than that a neighbouring proprietor, on whose lands the ruins abutted, should try to include them in his policy, treating them almost as derelict property. I can readily understand that the owners of *Pittencrieff* might suppose that if, even without any title, they inclosed these ruins, and made walks and plantations about them (admitting, as they seem to have done, all respectable persons to enjoy the recreation of walking in the grounds), they were only putting to a beneficial use that which all other persons seemed to have abandoned.

It remains, then, to be considered whether the Respondent has shewn that the place in question, at the date of the Crown charter of 1803, was held and enjoyed as part and pertinent of the barony of *Pittencrieff*. It may be assumed that it formed part of the policy of *Pittencrieff*, but that is consistent with its not forming part of the barony.

(1) "Policy" means ornamental grounds.

(2) See Lord *Deas's* opinion, Third Series of the Court of Session Cases, vol. iii. p. 455.

But there are circumstances connected with the case which make it highly improbable that the place in dispute can be included among the parts and pertinents of the barony. When a piece of land, not originally part of a barony, is included in a new charter as part of the barony, and is there described by metes and bounds, the Crown, in granting the new charter, can be in no doubt as to what is granted, and of what the barony is thus made to consist. But when there is nothing on the face of the charter to shew that more land is included in it than was comprised in the preceding charters,—nothing to shew that more was meant to pass under the words "parts and pertinents" than had been previously included under those words, it must be incumbent on the party who insists on such a title to shew that the Crown intended under these general words to include the additional land, or, at all events, that the additional land had come to be generally known and treated as part and pertinent of the barony. Otherwise the Crown might be granting that which it did not intend to grant, and which, from the language used, would not appear to be granted.

This observation applies with peculiar force to a case like the present, where the Crown had itself the *dominium utile* as well as the *dominium directum* of the land in question.

It can hardly be inferred, without proof, that the Crown intended, under the words "parts and pertinents of the Barony of *Pittencrieff*," to include its own lands, not shewn to have ever been known, or reputed, as being part and pertinent of the barony; still less can such an intention be inferred when the subject matter includes a royal palace, or the ruins of a royal palace. It is highly improbable that the Crown, if it intended to part with such a possession, should effect its object otherwise than by an express description of that which it meant to alienate.

But there are observations, leading to the same result, deducible from the charters of the barony, of which the palace, as I have already remarked, was certainly no part or pertinent in 1669. The subsequent charters of the *Pittencrieff* Barony, dated respectively in 1675, 1687, 1690, and 1762, enumerate expressly and specifically all its acquisitions, but they are wholly silent as to the piece of ground which forms the subject of this litigation.

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I concur with my noble and learned friend in advising your Lordships to reverse the interlocutor complained of.

*Ordered and adjudged accordingly.*

Solicitor for the Appellant: *Horace Watson.*
Solicitors for the Respondent: *Grahames & Wardlaw.*

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*March* 22.

BRUCE *et al.* . . . . . APPELLANTS;

AND

THE PRESBYTERY OF DEER *et al.* . . . RESPONDENTS.

*Charitable Bequest.*

When a charitable bequest is capable of two constructions, one which would make it void, and the other which would render it effectual, the latter must be adopted.

*Costs.*

The awarding of costs out of charity estates an encouragement to groundless litigation.

IN this case (1), the Court of Session decided that a bequest by *James Bruce*, of *Innerquhomery*, for the benefit of the poor of the presbytery of *Deer*, in *Aberdeenshire*, was valid and effectual.

The Appellants, on the other hand, as next of kin of the deceased, contended that the gift was void for uncertainty. They appealed to the House.

The *Attorney-General* (2), Mr. *Anderson*, Q.C., and Mr. *John Skelton*, were of counsel for the Appellants.

Sir *Roundell Palmer*, Q.C., Mr. *Young*, and Mr. *A. B. Shand*, for the Respondents.

At the conclusion of the argument on behalf of the Appellants, their Lordships delivered judgment, as follows:—

THE LORD CHANCELLOR (3):—

My Lords, this case appears so clear as to render it unnecessary to call upon the counsel for the Respondents. The question arises

(1) Reported below, 3rd Series of Court of Session Cases, vol. iii. p. 406.
(2) Sir *John Rolt.* (3) Lord *Chelmsford.*

upon the following short clause in the will of *James Bruce*:— "The whole of the balance of my property I leave to poor of this presbytery, to be divided, I mean the interest, by the sessions of the several churches, but to be paid to all Christians except Roman Catholics." This is contended by the next of kin to be void for uncertainty.

It is quite clear that this was intended as a charitable bequest; and therefore it must be carried out, if the general object of the testator can be ascertained. When it is said that charitable bequests must receive a benignant construction, the meaning is, that when the bequest is capable of two constructions, one which would make it void, and the other which would render it effectual, the latter must be adopted; and I agree in the remark made by my noble and learned friend, Lord *Cranworth*, in the case of *Morgan* v. *Morris* (1), where he says: "There has always been a latitude allowed to charitable bequests, so that when the general intention is indicated, the Court will find the means of carrying the details into execution."

The bequest in question seems to me to define with sufficient certainty the *subject*, the *objects*, and the *administrators* of the charitable gift. The subject is "the balance" or residue of the testator's property. This is admitted, on the part of the Appellants, to be perfectly clear, and the objects are, in my opinion, sufficiently defined. The testator says, "I leave to poor of this presbytery." Now, the word "poor" in the context is equivalent, in my opinion, to the expression "the poor;" but it is not to the poor everywhere, but to the poor "of this presbytery," which must be taken as a local description. In popular language, it may mean the territory over which the jurisdiction of the Church Court, called the Presbytery, extends. Adopting the word in that sense, we have the objects sufficiently defined to be the poor of a particular district. It is said that the bounds of presbyteries vary from time to time. But at any given time they must have a certain limit, and the expression "the presbytery of *Deer*, in the county of *Aberdeen*," where the testator lived at the time when he made his will, is involved in no uncertainty at all.

Therefore, the subject and the objects are, in my opinion, clearly

(1) 3 Macq. 134.

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defined; and we have only now to consider whether the administrators of the charitable gift are also described with sufficient certainty. The words are, "to be divided, I mean the interest, by the sessions of the several churches." That must mean to be distributed—not to be divided—but to be distributed by the kirk sessions of the several churches. "The sessions of the several churches," without condition or qualification, must, in my opinion, mean "the kirk sessions of the established church." Then, the result is, that it is a gift to be administered by the kirk session, according to the discretion of the kirk session, amongst Christians of all denominations, except Roman Catholics, within the bounds of the presbytery. All this appears to be sufficiently clear, and, therefore, I submit to your Lordships that the interlocutors appealed from ought to be affirmed; and, as it has been agreed on the other side, the costs are to come out of the estate.

LORD CRANWORTH:—

My Lords, I quite agree, and only doubt whether, in cases of this sort, the House has not been a little too lax in allowing costs to come out of the estate; because such allowance rather encourages appeals, when they are known and felt to be absolutely desperate.

LORD WESTBURY was of opinion that if the Respondents had not been indulgent, the Appellants would not have been allowed costs by the strict rules of justice in the House.

LORD COLONSAY concurred.

*Interlocutors affirmed; Appeal dismissed, but with directions that the costs of the appeal should be paid out of the estate.*

Solicitors for the Appellants: *Bircham, Dalrymple, Drake, & Bircham.*

Solicitors for the Respondents: *Grahames & Wardlaw.*

LINDSEY, *et al.* . . . . . APPELLANTS; 1867 *March* 21, 22.

AND

OSWALD, *et al.* . . . . . RESPONDENTS.

*Entail—Alienation distinguished from Alteration of the Order of Succession.*

Alienation is a destruction of the succession rather than an alteration of its course. It removes the subject alienated from the operation of the tailzie, and leaves it as if no tailzie existed.

A deed, however, may in form partake of the character of an alienation, and yet not cease on that account to be a deed altering the order of succession.

A DEED of entail executed on the 22nd of January, 1790, by the trustees of *Richard Oswald,* of *Auchencruive,* in the county of *Ayr,* satisfied the requirements of the Act, 1685, c. 22, with this exception, namely, that one word—the word "irredeemably"—occurring in the clause prohibiting alienation was written on an *erasure.*

That clause was as follows:—

"It shall not be in the power of any of the heirs male, general, or of tailzie, who shall succeed to the said lands and estate, to sell, alienate, impignorate or dispone the said lands and estate, or any part thereof, either *irredeemably* or under reversion."

The usual clause against altering the order of succession was as follows:—

"It shall not be in the power of any of the heirs male, general, or of tailzie, who shall succeed to the said lands and estate, to alter, innovate, or change the order of succession herein prescribed, or to do any act or deed that may import or infer any alteration, innovation, or change thereof, directly or indirectly."

In October, 1838, the heir of entail in possession, *Richard Alexander Oswald,* conveyed, by a gratuitous *mortis causâ* deed, to trustees the whole property, heritable and personal, which should belong to him at his death, and directed his trustees to turn the same into money for distribution among certain beneficiaries. He died on the 19th of June, 1841.

On the 19th of June, 1861, his trustees instituted the present suit against the subsequent heirs of entail, to have it found that the deed of the 19th October, 1838, constituted an effectual

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conveyance to them of the lands and estates embraced by the entail.

A defence was lodged by the heirs of entail, and the usual condescendence and answers followed.

The Lord Ordinary assoilzied the heirs of entail;—holding that although the erasure was admitted, and although it was an erasure *in substantialibus* — which might affect the clause prohibiting alienation—yet inasmuch as the other clause above set forth, prohibiting any alteration in the order of succession, was, in all respects, perfect and complete, there was enough in that clause to bar the gratuitous *mortis causâ* instrument set up by the trustees.

On a reclaiming note to the Second Division of the Court of Session, judgment was pronounced, adhering to the Lord Ordinary's interlocator, with expenses.

The trustees thereupon presented their appeal to the House of Lords.

Mr. *Anderson*, Q.C., and Mr. *Young*, appeared for the Appellants, but in the course of their argument were requested to confine themselves to the question how far the clause prohibiting a change in the order of succession was, or was not, of itself sufficient to bar the deed of the 19th of October, 1838; because if it were sufficient to do so, the point as to the erasure in the other clause—that prohibiting alienation—would not arise. Under this direction, the Appellants' counsel contended that the deed of the 19th of October, 1838, was not a deed altering the order of succession, but a deed of alienation; whereby the maker alienated from himself to third parties. The distinction was well known, and had been long established in the law of *Scotland* (1). It was, in fact, recognised by the Act, 1685, which expressly requires both interdictions, as things differing from each other, and essential to constitute a valid entail. The ruling judicial authority is *Syme* v. *Dickson* (2), where the successful argument was that which the Appellants now rely upon. That the deed here is to trustees and gratuitous is of no moment. Neither is it material that it is *mortis causâ*. The case of *Carrick* v. *Buchanan* (3), relied upon by the Respondents, is not

(1) *Brown* v. *Countess of Dalhousie*, Mor. App. *voce* Taillie, No. 19; *Henderson* v. *Henderson*, 21st Nov. 1815.

(2) Fac. Coll. 3rd March, 1821.

(3) Bell's App. Ca. vol. iii. p. 342.

analogous, though even there Lord *Fullerton* stated that a deed might be an alienation though gratuitous. *Richard Alexander Oswald*, the maker of this deed of trust, was, in so far as respected alienation, an owner in fee simple. He did that which the defect in the entail left him at liberty to do. His deed of alienation has put an end to the entail, and the decree appealed from ought, therefore, to be reversed (1).

The *Attorney-General* (2), and Mr. *Andrew R. Clark*, for the Respondents, were not called upon to address the House.

THE LORD CHANCELLOR (3):—

My Lords, the object of the action is to have it declared that the Pursuers, as trustees under a trust disposition and settlement, executed by *Richard Alexander Oswald*, on the 19th of October, 1838, had full right to the whole lands, means, and estates, heritable and moveable, real and personal, which belonged to the said *Richard Alexander Oswald*.

The Defenders, in answer, allege that *Oswald* had no power to make the trust disposition and settlement, being prohibited by a deed of tailzie, dated the 22nd of January, 1790, under which he was heir of entail in possession.

The deed of tailzie was made by trustees in execution of a trust contained in a tailzie of the estate of *Auchencruive*, dated the 24th of March, 1780.

The deed of 1790, however, must be regarded as an independent tailzie, and not as depending upon any reference to the prior deed of 1780.

The deed of 1790 contains two prohibitory clauses, upon one of which the whole question turns. The first of them is a prohibition against changing the order of succession; the second is against alienation.

In this latter clause, the word "irredeemably" is written upon an erasure, *in essentialibus*, so that the whole clause is vitiated,

(1) The argument of the Appellants' counsel is given shortly, because it is so fully commented upon by the Law Peers. See the report of the case in the Court of Session Cases, 3rd Series, vol. ii. p. 249.

(2) Sir *John Rolt*.

(3) Lord *Chelmsford*.

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and there is, consequently, no valid prohibition against alienation.

The only prohibitory clause which is effective is that against altering the order of succession. The question, therefore, is, whether the trust disposition and settlement of the 19th of October, 1838, is to be regarded as an alteration of the order of succession?

The deed in question is a *mortis causâ* disposition by *Oswald* to trustees, and the purposes of the trust are declared to be for payment of the trustor's debts and legacies; and after these payments in trust, during the life of his widow, when she should think proper, to sell and dispose of the trust estate and effects, and invest the moneys in the funds and pay the whole of the dividends to her, and after her death to lay out and invest £30,000 for the use of the trustor's granddaughter, with trusts for his grandchildren and nephews and nieces; and, on failure of all the preceding trusts, the residue to be distributed under the English *Statute of Distributions.*

The Appellants contend that this deed is an alienation of the estate, and not a mere alteration of the order of succession. First, because the trustees are singular successors; and secondly, because it directs an entire conversion of the estate into money, and so produces not a mere alteration, but a complete termination of the order of succession; and in support of this view they rely strongly upon the case of *Syme* v. *Dickson* (1) as a decision which ought to govern the case.

Now, upon this case it must be observed that the deed was a disposition to trustees for payment of debts, and therefore in its terms an alienation within the prohibitory clause. The trustee, in order to take it out of the operation of that clause, endeavoured to give the deed the character of one effecting an alteration of the succession. But, unless the Pursuer could have satisfied the Court that if it actually altered the order of succession, it was not by means of a deed which amounted to an alienation, he could not have succeeded. I do not understand *Syme* v. *Dickson* to be an authority for the proposition apparently contended for by the Appellant, that if the deed had been one altering the order of

(1) Fac. Coll., 3rd March, 1821.

succession, it could not at the same time have been an alienation. There seems to be no reason why a deed should not at once violate both prohibitions.

But the argument of the Appellants appeared to make the object of the two prohibitory clauses so entirely different, as to be capable of only separate and distinct infringements. Thus, after speaking of the three cardinal prohibitions against alienation, against contracting debts, and against altering the order of succession, and after adverting to the distinction preserved between them in the Statute of 1685, and the Act of Parliament of 1848, they quoted the following words of Lord *Fullerton* in *Oliphant's Case* (1): "The question is brought to this point, whether the deed of 1816 is an alienation, or an alteration of the order of succession. No doubt every question of this kind may be stated so as to raise an apparent difficulty. For a deed altering the order of succession is an alienation as to those heirs who are excluded, and, on the other hand, an alienation is a most effectual alteration of the former order of succession."

These observations were made on a case in which the entail effectually prohibited alienations, but did not prohibit alteration of the order of succession; and Lord *Fullerton*, remarking that "the deed was in the ordinary technical form of a deed of alteration," added an observation which completely meets the present case. He said: "I do not think that a disposition leaving the disponer in full possession, and conveying the estate after her death to a third party, would have been an alienation, but an alteration of the order of succession."

In the present case, it seems impossible to deny that the trust disposition and settlement of *Richard Alexander Oswald*, if permitted to take effect, would innovate and change the order of succession, and divert the estate into a different channel. The observation of Lord *Fullerton* is in exact accordance with the interlocutor of the Lord Ordinary, and with the unanimous judgment of the Second Division in the present case. With such a weight of authority against the Appellants, I have no hesitation in advising your Lordships to affirm the decision complained of.

(1) 13 New Series, 1179.

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LORD CRANWORTH:—

My Lords, before the passing of *Lord Rutherford's Act*, in 1848, a defect in any one of what have been called the "three cardinal prohibitions" did not make the tailzie void, but simply left to the heir of tailzie in possession the liberty to do the act not duly prohibited, the other provisions of the tailzie remaining in force; and in this case, the question having arisen in 1841, must be solved irrespectively of the Act of 1848.

I assume for the present argument that there is here no valid prohibition against alienation; and, therefore, if what was done by the *mortis causâ* deed of 1838 is to be treated as an alienation of the entailed estate by *Richard Alexander Oswald*, and not as an altering of the order of succession, then the Appellants are right, and the Court below wrong. But I am opinion that what was done by the *mortis causâ* deed, assuming it to apply to and to comprise the entailed lands, was, as to these lands, not an alienation within the meaning of the statutes regulating entails, but an altering of the order of succession.

A distinct meaning ought to be given to every one of the three restrictions; and therefore, although every alienation may popularly be described as altering the order of succession, yet that is not the meaning of the word "alienation" as used in the statutes. Alienation is a destruction of the succession rather than an alteration of its course. It removes the subject alienated from the operation of the tailzie, and leaves it as if no tailzie existed. If that be a correct interpretation of the language of the statutes when they speak of alienation, as I cannot doubt it is, there was here no alienation; for alienation to be valid, if made by an heir of tailzie not prohibited from alienation, must be made by him while he is in possession as heir of tailzie. He may in his lifetime by alienation destroy the succession; but as soon as he dies his power over the entailed property is an end, and the title of the person next in succession under the tailzie takes effect. And if the right of that person is defeated by the *mortis causâ* deed, the effect of that deed is to divert the course of succession from the person entitled under the tailzie, and to carry it to the person or persons entitled under the *mortis causâ* deed. It can make no

difference that the person claiming to be entitled under the *mortis causâ* deed is thereby directed to sell. He can only do that after he has succeeded to the estate in an order of succession different from that described by the tailzie.

On these short grounds, the decision of the Court below appears to me to have been perfectly correct.

LORD WESTBURY:—

My Lords, I am ready to grant, for the purpose of the present judgment, to the Appellants, that the erasure contained in the prohibitory clause against sale, alienation, and impignoration, vitiates the whole of that prohibition. I am also ready to grant, or to assume, for the purpose of the present argument, that if the settlor in the deed of 1838 had been an unrestrained fee simple proprietor, the lands in question might have been taken as passing by virtue of that instrument.

It may be unnecessary to mention (but perhaps it may be desirable to do so, in order to shew that we have not forgotten it) the well-established principle, that an heir of entail, according to the Scotch law, is absolute fiar, and has all the characteristics of a fee simple proprietor, save to the extent to which he is restrained by the fetters of the entail. One other observation may be necessary, namely, that this is a case *inter hæredes;* and deeds of entail being by Scotch law good at common law, it is here simply necessary to inquire, whether the deed of 1838 is struck at by any prohibition, because if there be a prohibition within the terms of which that deed falls, it will be sufficient to avoid the instrument.

The argument on the part of the Appellants consists of two propositions: one forming the major premise of their syllogism, the other the minor. Their first proposition was this:—No gratuitous deeds of alienation fall within the terms of a simple prohibition against altering the order of succession. They attempted to maintain that general proposition by two or three cases, the principal of which were, first, the case of *Syme* v. *Dickson* (1), and then, secondly, *Lady Dalhousie's Case* (2). Now, in the case of *Syme* v. *Dickson*, there was a prohibition against alienation; but there was

(1) Fac. Coll. 3rd March, 1821.
(2) Morr. App. *voce* Tailzie, No. 19.

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no prohibition against altering the order of succession. The instrument which was executed by the heir of entail had an immediate operation, because it conveyed to trustees the lands then belonging to him, and which he should possess at the time of his death. And the trust was present and immediate, namely, to sell those lands. It was not a revocable instrument, nor was a life rent reserved to the grantor. That deed, therefore, was struck at by the prohibition against alienation. But the contention was to give it a different character from that of alienation, and to bring it, if possible, within the character of a deed altering the order of succession. The Court of Session, however, held that it was an alienation, and refused to bring it within the compass of any prohibition, if there had been a prohibition against altering the order of succession. That case by no means proves this conclusion, that a gratuitous deed of alienation may not be bad as an instrument altering the order of succession.

In *Lady Dalhousie's Case*, the heir of entail executed a disposition in favour of himself and the heirs male of his body. It was held that, inasmuch as the estate of the disponer was reserved to the disponer, it was not an alienation, but was a deed altering the order of succession.

With regard to this first general proposition of the Appellants, it appears to me to be effectually disproved by the language of the Judge in the case of *Oliphant* (1), and also by the decision of this House in the case of *Innes* v. *Ker* (2), both of which cases appear to me effectually to dispose of the assertion that a gratuitous deed of alienation cannot be struck at by a clause against altering the order of succession.

The next proposition, the minor premise of the Appellants, is that this particular instrument of 1838 is a deed of alienation, and being a deed of alienation, they say it cannot be brought within the compass of the prohibition against altering the order of succession. Now it is in this proposition, as in most instances of false reasoning, that the error of the Appellants principally lies. This deed has none of the characteristics of alienation. In the first place, the life-rent of the settlor is absolutely reserved. In the next place, the deed is purely *mortis causâ*, and, therefore, in its

(1) 13 Dun. 1174.
(2) 2 Dow. 149; Morr. *voce* Taillie, App. No. 18; and *Roxburgh* v. *Ker*, Fac. Coll. 17th June, 1813.

own nature revocable. In the third place, it is expressly made subject to revocation *ex capite lecti*, even at the last moment of the grantor's life. Now what is the character of an instrument of that kind? Can it be properly termed an alienation? It has no operation whatever *inter vivos;* it has no operation until the death of the settlor. Then on the death of the settlor, what is the effect? Why, that under the original deed of entail, the heir of tailzie under the destination in that deed becomes entitled. But what would be the operation of this trust deed of 1838? Its only operation, its only object, aim, and purpose, would be to give to the estate a different owner from the successor that would be entitled to it under the destination of the entail. But can any one say that an instrument the object and effect of which are clearly to alter the ownership at the death of the settlor, is not an instrument which has for its sole purpose and aim, and its only operation, to give to the estate a different succession at the death of the settlor?

An instrument of which these things may be truly predicated cannot be called an alienation except by a misnomer. It is nothing to say that it would be competent to the trustees to feudalize their titles under that deed. If they had done so, the destination of the deed still remained revocable, having no effect whatever on the enjoyment of the property till the death of the settlor. These are the characteristics, not of a deed of alienation operating *in presenti inter vivos,* but of an instrument the effect of which is postponed till the death of the settlor, and then intended to operate upon the destination contained in the deed of entail by substituting a new line into the order of succession.

LORD COLONSAY:—

My Lords, I concur entirely in the conclusion at which your Lordships have arrived.

It appears to me that this deed in form partakes of the character of an alienation, but it does not on that account cease to be a deed altering the order of succession. I see it stated in the written argument for the Appellants, that "a deed altering the succession is a deed whereby an heir of entail in possession of the estate under a destination to himself and his heirs male, resigns it in favour and for new enfeftment to himself and his heirs general.

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In such a case, the heirs general take through him and not from him." Now, it is true that that is a most common mode of altering the order of succession; but it is not the only mode of altering the order of succession. I know of no authority for holding that an alteration in the order of succession may not be effected, although the heir in possession does not first convey to himself. Indeed I think the Appellants were unable to sustain this argument even in their printed case, because in a subsequent part of it they fall off from that position, and seem substantially to admit that if this deed had been one conveying the estate to trustees in the manner in which it is attempted to be conveyed, with instructions to make it over to another set of heirs, in that case it would have been a deed altering the order of succession. That implies that a conveyance to trustees, though it be in form an alienation, may still be a step in the alteration of the order of succession, and that it is not merely by a resignation in favour of himself and his heirs that an alteration in the succession can be effected.

This leads us to look at the nature of this deed. The deed is one which was made by Mr. *Oswald* for the purpose of settling affairs at his death. It is a deed conveying to trustees, but it was revocable, and not to take effect during his life. In every sense it was a *mortis causâ* deed, a gratuitous deed. And that being the nature of the deed, it attempts to put the estates into the hands of trustees, with directions to do certain things. One of these things is to give a life-rent to a party who is not entitled to a life-rent under the entail. Therefore it is a deed which, if effect be given to it, would take away the immediate succession to the estate from the heirs who were appointed by the entail. It has not the ordinary force of an alienation. It was not designed to serve the ordinary purpose of an alienation. It is not what I think is meant by "alienation" under the Statute of 1685. It is not a *de presenti* conveyance in effect. The party did not divest himself of the estate; he did not put it away from him; he did not give it over to any other person. And therefore, though partaking in form of the character of alienation, it is not a conveyance such as is contemplated under the clause of the entail which prohibits alienation, but it is an attempt to alter the order of succession;

and it is, therefore, a contravention of that clause of the entail which effectually prohibits alterations of the order of succession.

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I abstain from giving any opinion upon a point which was raised in the argument as to the effect of the erasure. I do not think it necessary to do more than assume that it might be conclusive, at all events, against "irredeemable alienations;" nor do I give any opinion upon the further point, whether such a general conveyance would be effectual to carry an estate settled by way of entail, but not particularly mentioned in the general conveyance. That question may afterwards come before the House, but at present I abstain from expressing any opinion on it.

*Interlocutors appealed from affirmed, and appeal dismissed with costs.*

Solicitors for the Appellants: *Preston & Karslake.*
Solicitors for the Respondents: *Loch & Maclaurin.*

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MRS. DUNLOP . . . . . APPELLANT;

AND

JOHNSTON . . . . . RESPONDENT.

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*April* 2.

*Post-nuptial Settlement—Husband's subsequent Bankruptcy—Wife's Claim.*

A post-nuptial settlement, in so far as it secured a separate provision for the wife during coverture, *held* to have been voluntary and gratuitous, and to have been revoked and superseded by the husband's subsequent bankruptcy (1).

*Per* LORD COLONSAY:—Grants by a husband to his wife, *stante matrimonio*, are revocable, unless special circumstances are established to make out an exceptional case.

ON the 30th of October, 1860, the Appellant, then a spinster, married *George Moore Dunlop*, without a settlement. She had no

(1) By the law of *England*, a voluntary settlement in favour of a wife is valid if made by a husband not indebted at the time. When, however, the husband is indebted at the time of making the settlement, and his debts are so considerable as to render him insolvent, the settlement will be void under the 13 Eliz. c. 5; that is to say, it will be set aside by creditors entitled to impeach it: *Macqueen* on Husband and Wife, p. 274.

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fortune. He had £10,000. After the marriage he embarked in trade.

On the 29th of March, 1861, when perfectly solvent, he executed a post-nuptial settlement, whereby, reciting that it was incumbent on him to make a suitable provision for his wife, he directed his trustees to invest £5000 on good security, and to make payment of the interest, dividends, or income thereof to her *during the subsistence of the said marriage,* for the better aliment and support of herself and family, and for the education of any child or children who might be born of the said marriage; declaring that the said income should be alimentary, and not assignable by her, and that the *jus mariti* and rights of the husband's creditors should be barred and excluded.

The deed contained a clause whereby the wife accepted its provisions in full satisfaction of *jus relictæ*, and of all other claims, legal or conventional, that might arise to her by survivorship.

Soon after the execution of this deed the husband got into difficulties. On the 6th of August, 1863, he was declared a bankrupt, and his property was sequestrated for creditors. Then the question arose, what was to be the effect of the post-nuptial settlement? one child having been born of the marriage, and the mother being deserted by her husband, who had fled to *America.*

On the 23rd of February, 1864, the above Respondent, trustee on the husband's sequestrated estate, instituted the present suit to have the settlement reduced and rescinded, *in so far as it secured for the wife the income of the* £5000 *during the marriage.*

The wife lodged her defence. The Lord Ordinary held that the provision for the wife, in so far as the income of the £5000 was directed to be paid to her during the subsistence of the marriage, was but a revocable donation *inter virum et uxorem,* revocable by the husband, and actually revoked by the sequestration and the trustee's suit. The settlement, therefore, within the limits specified, was reduced and rescinded. And upon a reclaiming note to the Second Division the judgment of the Lord Ordinary was adhered to. Hence the present appeal to the House; the wife suing *in formâ pauperis.*

Mr. *Robert Horn,* of the Scotch bar (Mr. *Rupert Potter,* of the

Equity bar, with him), on behalf of the Appellant contended, in the first place, that there could be no revocation of this settlement, because the husband had absolutely divested himself of the £5000 *onerously*, and in fulfilment of a natural and legal obligation to support his wife and children during the marriage. In illustration and support of this proposition, the following authorities were cited, namely: 1 *Bell's* Comm. (1), where it is laid down that "a husband may so dispose of a part of his estate as to secure to the wife a fund of subsistence effectual against all debts subsequent to the transaction": *Macdonald* v. *Macdonald* (2); *Smitton* v. *Tod* (3); *Turnbull* v. *Turnbull* (4); *Bell's* Principles (5), where he affirms that "a provision for the wife's use during marriage may be made post-nuptially, if the husband be solvent at the time"; *Inglis* v. *Lowrie* (6); *Macpherson* v. *Graham* (7); *Macgregor* v. *Macgregor* (8); *Jeffrey* v. *Campbell* (9); *Kemp* v. *Napier* (10); *Morrice* v. *Sprot* (11); *Wright* v. *Harley* (12); *Craig* v. *Galloway* (13); *Rust* v. *Smith* (14).

Secondly, Mr. *Horn* urged that revocation of the post-nuptial settlement was excluded, by reason of its having been executed by the husband and accepted by the wife in satisfaction of her *jus relictæ*, and other rights, which might accrue to her by survivorship. The authorities cited on this point were the following: *Hepburn* v. *Brown* (15); *Hunter* v. *Dickson* (16); *Macdonald* v. *Macdonald* (2).

Thirdly, Mr. *Horn* argued that the post-nuptial deed of settlement was irrevocable, inasmuch as it provided for the aliment, support, and education of the children of the marriage, citing the following authorities: *Turnbull* v. *Turnbull* (4); *Smitton* v. *Tod* (3); *Kemp* v. *Napier* (10); *Wright* v. *Harley* (12).

The other arguments adduced in support of the appeal are fully examined in the opinions of the Law Lords.

(1) Page 634; see also 1 Bell's Comm. 642.
(2) 10th July, 1863. 1 Macp. 1065.
(3) 12th Dec. 1839; 2 Dun. 225.
(4) 1 Wil. & Sh. 80.
(5) Sect. 1944.
(6) Morr. 6131.
(7) Morr. 6113.
(8) Fac. Coll. 22nd Jan. 1820.
(9) 4 Sh. 32, 2nd ed. p. 33.
(10) 4 Dun. 558.
(11) 8 Dun. 918.
(12) 9 Dun. 1151.
(13) 4 Macq. 267.
(14) 14th January, 1865; Scotch Cases, 3rd Ser. vol. iii. p. 378.
(15) 2 Dowl. 342; 6th June, 1814.
(16) 5 Wil. & Sh. 455.

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At the close of Mr. *Horn's* argument, their Lordships, without calling on Mr. *Anderson*, Q.C., Mr. *Scott*, and Mr. *Colt*, the counsel of the Respondent, delivered judgment as follows:

THE LORD CHANCELLOR (1):—

My Lords,—That portion of the provision for the wife which is to exist during the subsistence of the marriage is the only part of this post-nuptial contract which is impeached; and that is really the only question raised in this case.

The decision appealed from is objected to, by the Appellant, on the ground that the post-nuptial settlement in question is executed in implement of his natural and legal obligation to aliment and provide for his wife and children *during the marriage*. But what is this natural and legal obligation? It is to support and aliment his wife and children, during the marriage, according to his ability. There is no natural obligation recognised by Scotch law to divest himself of a portion of his property and put it out of his control to provide for his wife and children. On the contrary, it would rather appear to be his natural duty to preserve his right, as head of the family, to dispense his means according to a just view of his obligations, and not to deprive himself of the exercise of that discretion by making an absolute and irrevocable disposition of any portion of it to his wife.

The Appellant, in the next place, insists that the provision in the contract is onerous, because it was granted by the husband, and accepted by the Appellant, in lieu and satisfaction of her common law rights and claims against her husband's estate. But these legal claims of the wife only come into operation after the death of the husband. Her legal claim, during the subsistence of the marriage, is to proper aliment and support, which is rather to be regarded in the light of an obligation on the husband than of a right in the wife, which she can relinquish, so as to render a deed onerous which is founded on such a relinquishment.

The third, and last, ground upon which the Appellant insists, is, that the provision in question is onerous and irrevocable, because it is granted for the aliment, support, and education of the children of the marriage, as well as for the aliment of the Appellant her-

(1) Lord *Chelmsford.*

self. Now, a donation by a father to his children is not revocable, like a donation by a husband to his wife. But I agree with the Lord Ordinary, that this cannot be held to be a provision in favour of the children. The post-nuptial contract sets forth, as its inductive cause, the propriety of making a "suitable provision" for the wife; it does not constitute a *jus crediti*, or direct prestable right, in the children.

Upon the whole, my Lords, it seems to me clear that the interlocutors appealed from are well founded in principle and upon authority; and I submit to your Lordships that they ought to be affirmed.

LORD ROMILLY:—

My Lords, I entirely assent to the views that have been expressed by the Lord Chancellor. I understand the principle of the Scottish law to be, that all donations between husband and wife are revocable, subject, however, to certain exceptions:—first, where the husband is performing a natural obligation; and, secondly, where there is a consideration for the donation which makes the contract onerous.

It is important, therefore, to consider what is meant by "a natural obligation." Now, I apprehend that, though there is, in one sense, a natural obligation on a husband and father to support his wife and children during his life, that is not the meaning of the words "natural obligation," as used to support a donation from a husband to a wife, because the law enforces that already. Accordingly, by a contract to support his wife and children a husband binds himself to do nothing more than he is compelled to do without entering into any such contract. But the support of his wife and children after he has ceased to exist, is not an obligation which can be enforced by law; and this is "a natural obligation" which will not be performed unless he himself performs it. That is "a natural obligation" within the meaning of the exception which makes such a contract onerous; and, consequently, if the husband makes a deed or contract for the support of his wife and children after his death, after the marriage is over, that, I apprehend, is the performance of "a natural obligation" which will support a contract of this description.

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There is, therefore, as it appears to me, an important distinction to be drawn with respect to that part of the argument which was pressed upon us with so much ability by Mr. *Horn*, when he tried to put the natural obligation of supporting a wife *stante matrimonio* on exactly the same footing as the support of the wife after the marriage is over. It is upon this ground, my Lords, and, considering that the sole question we have to consider here to be one which relates to a provision for the support of the wife during the marriage, and not at all after the marriage, that it does not appear to me that this case comes within the exception which would prevent the application of the rule of the Scotch law, by which all donations between husband and wife are held to be revocable.

So, also, I think, there is no consideration of an onerous character in any other respect, because the abandonment by the wife of the *jus relictæ* only applies to what she gives up after the marriage is over, and can hardly apply to that which exists during the time that the marriage is subsisting. It is, confessedly, not before us to consider whether the contract be or be not a good one after the marriage has been concluded.

I also concur in the observation which has been made by the Lord Chancellor with respect to this question, that the children of the marriage are not the objects of the deed, but that the wife is the object of the contract, and that this is a contract made expressly and directly for her benefit.

When Mr. *Horn* suggested that, if there had been no bankruptcy, and if the husband had neglected his wife and children, the Scottish Courts would not, under this contract, have sequestrated this fund, and made some provision for the wife and children, it occurred to me as probable, that even without the contract, such a proceeding might have taken place under the Scottish law, and that the Courts might have sequestrated this fund, and appointed some person to have control over it, and to apply it to the support of the wife and children; there being, I apprehend, according to the Scottish law, though not according to English law, an obligation on the part of the mother to support her own children.

For these reasons, my Lords, I am of opinion that the decision of the Courts below was correct, and that this appeal ought to be dismissed.

LORD COLONSAY:—

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My Lords, I concur in the conclusion at which your Lordships have arrived. All the arguments that could be advanced in support of the appeal have been urged by the counsel for the Appellant. He has stated every point, and cited every case that could be brought at all to bear on the matter, and with that ability and research with which those who have been accustomed to hear him speak are well acquainted: but, my Lords, I think all that learning and all that ability have failed to establish a good case on the part of the Appellant.

There is a clear distinction, in the law of *Scotland*, between rights that exist under an *ante*-nuptial, and under a *post*-nuptial contract. And there is a clear distinction between rights granted by a husband in favour of a wife, which are to take effect after the marriage is terminated, and those which are attempted to be granted by the husband, in favour of a wife, to take effect during the subsistence of the marriage. But the broad argument that was maintained on the part of the Appellant would go far to obliterate these distinctions. And, indeed, it would come to this, that without any special circumstances, in every case the gift of a sum of money, made nominally by way of provision by the husband to his wife, *stante matrimonio*, is effectual, and cannot be revoked. That seems to be the substance of the argument. Now I cannot admit that such is the doctrine of the law.

The doctrine of the law is, that grants by a husband in favour of his wife, *stante matrimonio*, are revocable; and special circumstances must be established in order to make out an exceptional case. Now I do not find in this deed, or in any of the circumstances stated with reference to the condition of the husband or the wife, anything that can constitute a special and exceptional case. The wife brought no fund into the common stock. The husband was not in circumstances that required him to make any provision of this kind. There is no special circumstance that I see asserted—there is none urged—there is nothing that could account for what he did, except that he chose to make a grant to his wife when he was under no obligation whatever to make it, or, in other words, by way of donation. If the doctrine of

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natural obligation to provide for a wife and children were to be carried to the extent that has been contended for here, then, in every case, and without any special circumstances whatever, the provision could be maintained. But there is no legal obligation on the husband, as your Lordships have observed, to set apart a portion of his own estate: there is not even any natural obligation upon him to do so; for I concur in the remark of one of your Lordships, that the natural mode of providing for a wife and children, *stante matrimonio,* is by the husband's prudent and judicious management of his means. The cases which have been referred to in which any countenance has been given to the doctrine that has been pressed upon us, were all cases of special circumstances. Even if we go back to the case of *Short and Birnie* v. *Murray* (1), that was a case in which the husband had reserved his own life-rent, and it was by an ingenious argument suggested that it was a present provision for the wife, because, although the husband had reserved his life-rent, the wife could go into the market and dispose of the fee. But, in that case, the provision was one that was not to take effect during the husband's life, but he was to have the benefit during his life of the income arising out of that fund. So also in other cases that have been referred to. The case of *McPherson* v. *Graham* (2) was a very special case indeed. That was the case of a renunciation of the husband's *jus mariti;* and, in that case, there had been an actual possession of the fund by trustees, and a payment of it to the children of the wife after her death. The marriage had been dissolved by death, and the husband came forward to claim those sums which the trustees had paid to the children in fulfilment of his own deed. That, again, was a special case. So, also, in the recent case that has been referred to: *Rust and Smith* (3). That was a case of a very peculiar kind, in which the wife was carrying on a separate business for the maintenance of the family—a special circumstance to be taken into consideration. In short, in all the cases referred to there were special circumstances which warranted the supporting of the provision. But the present case is without special circumstances. It is nothing but a provision made without any onerous considera-

(1) Morr. 6124. (2) Morr. 6113.
(3) 14th of January, 1865; Scotch Cases, 3rd Ser. vol. iii. p. 378.

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tion, and without any circumstances that could constitute a special occasion for its being made.

It is said that the wife renounces her legal rights. I do not think, in this case, that comes to be a matter of great importance. The question here is not in regard to the wife's rights after the dissolution of the marriage. We have nothing to do with these. It does not appear that there was any such importance attachable to the renunciation by her of her legal rights as to raise this deed into the condition of an onerous one. The rights of the children were not renounced—they are reserved; and exist even on the dissolution of the marriage. I concur, therefore, with your Lordships in thinking that the Appellant has not succeeded in making out a case.

THE LORD CHANCELLOR:—

The Appellant in this case is a pauper, and therefore we say nothing whatever about costs.

*Interlocutors appealed from affirmed, and appeal dismissed.*

Solicitor for the Appellant: *John Greig.*
Solicitors for the Respondent: *Bannister & Robinson.*

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*April* 5.

JENKINS . . . . . APPELLANT;

AND

ROBERTSON *et al.* . . . . . RESPONDENTS.

*Decree by Compromise—Res Judicata.*

A decree obtained by arrangement between the contending parties, the Court bestowing no judicial examination on the merits of the question, can never be *res judicata.*

*Declarator; its Power and its Utility in determining a Right of Way.*

*Per* LORD COLONSAY:—My opinion is, that when an action of declarator to establish a right of way is fully and fairly tried, the verdict and the judgment, on becoming final, conclusively settle the question at issue as regards the public.

*Per* LORD ROMILLY:—According to the English law, no party would be

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precluded by a prior judgment. But in the action of declarator which obtains in *Scotland* (a very desirable one), the whole question of right may be gone into; and if the Court comes to a judicial decision I am by no means prepared to say that it will not bind all.

IN 1860, the provost, bailies, and councillors of the burgh of *Elgin*, in the county of *Moray*, and certain other individuals, commenced an action in the Court of Session, "for behoof of the inhabitants and of the public," to have it found and declared that there existed a public right of way for foot passengers along the right bank of the river *Lossie*, near the town.

The owners of the land affected put in their defence; and issues having been adjusted, the cause came on for trial, and the jury returned a verdict for the Pursuers.

The Defenders moved for a rule to shew cause why a new trial should not be granted, on the ground that the verdict was against evidence. The Court granted a new trial.

In this state of matters a compromise was effected, whereby the Pursuers, the provost, bailies, and councillors, and others aforesaid, who had instituted the litigation, and got a verdict establishing their claim, abandoned it, and agreed not only that the Defenders should be assoilzied from the conclusions of the action, but that the Pursuers should pay to them £200 for expenses.

A formal minute to this effect was drawn up and signed by the parties; and it was followed by a written consent, signed by their respective counsel, to the effect "that the order for a new trial should be discharged, that the authority of the Court should be interposed to the minute, and that a decree in terms thereof should be pronounced."

In pursuance of this arrangement, the Court, on the 15th of May, 1862, pronounced judgment absolving the Defenders from the whole conclusions of the action, and decreeing against the Pursuers for the amount of expenses agreed upon.

It was under these circumstances that the above Appellant, *William Jenkins*, a shoemaker in *Elgin*, and *William Halkett*, *Alexander Youngson*, and *Alexander Simpson*, who were then associated with him, determined to bring again before the Court the question which had thus been adjudicated upon, or, rather, compromised.

On the 5th of March, 1863, they commenced the present action by a summons substantially identical in its terms and in its prayer with that which had started the prior litigation. To shew that the conclusions were practically the same, the Respondents set them out in parallel columns as an appendix to their case.

The Defenders to this fresh action were the above Respondents, against whom the jury had awarded a verdict, but in whose favour the Court had by compromise pronounced a decision.

The following were the "pleas in law" advanced by the Defenders against the new action:

1. "*Res judicata*, in respect of the decree of absolviter above-mentioned."

2. "The interests of the Pursuers in the alleged right of way having been competently and effectually represented in the former action of declarator, which was instituted and conducted with their knowledge and consent, they are, in virtue of the said decree of absolvitor, barred from insisting in the conclusions of this action."

3. "The Pursuers are not entitled to insist in the conclusions of the present action until the said decree of absolvitor is reduced, or otherwise competently set aside."

4. "As the Pursuers do not aver or found upon any grounds of action in this process which were not raised or embraced within the former action, the decree of absolvitor pronounced therein, even if not amounting to *res judicata*, is effectual to bar the Pursuers from insisting in the conclusions of the present action as laid."

The "pleas in law" of the Pursuers were these:

1. "The plea of *res judicata* ought to be repelled, in respect that the present Pursuers were not parties to the former action."

2. "So far as they assumed to represent the public, it was illegal and incompetent for the Pursuers of the former action, while holding a verdict in their favour, to consent to decree of absolvitor, and the present Pursuers are in no way affected thereby."

3. "In a declarator of right of way, the right to sue is commensurate with the right to use, and the Pursuers, as members of the community, are entitled to insist in this action."

4. "In respect of the immemorial use and possession, the public are entitled to the right of way claimed, and the Pursuers to decree as concluded for."

One of the Defenders associated with *Jenkins*—namely, *William Grigor*, a solicitor, in *Elgin*—had a separate plea in law, which was as follows:—

"The decree of absolvitor is a decree *in foro*; and the same not having been reduced, the Pursuers are not entitled to insist in the present action."

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The Lord Ordinary (1), on the 9th of December, 1863, decided as follows:—

"Finds, *primo*, that the Pursuers have set forth and hold a sufficient title to be heard for their own interest, and to crave judgment in this case, and therefore repels the first plea in law for the Defenders (*res judicata*); but, *secundo*, sustains the second plea in law stated for the Defendant, *Grigor;* and in respect thereof assoilzies the several Defenders from the conclusions of the summons, and finds the Pursuers liable to the Defenders in expenses."

Upon a reclaiming note, the First Division of the Court of Session, on the 9th of June, 1864, adhered to the interlocutor complained of, and refused the desire of the reclaiming note, with expenses.

The appeal to the House was by *William Jenkins* alone. For him appeared as counsel, Mr. *Scott* (of the Scotch Bar) and Mr. *J. S. Will;* who contended that the decree of absolvitor relied upon by the Respondents was no bar to the present action. It was procured from the Court below, without judicial examination, by a collusive pecuniary arrangement, to which the Appellant was no party. The Court bestowed no thought on the merits of the case; they went on the agreement of the parties. The plea of *res judicata,* therefore, was wholly inapplicable. The parties to the former action had no authority to represent or bind the public. The Appellant sued in his own right; he did not affect to represent any other interest. The hardship on the owner, who is exposed to repeated actions, is more apparent than real. If both *A.* and *B.* fail in such a case, it is not likely that *C.* will take the field. Practically, no evil is experienced. The following authorities were cited for the Appellant, namely:—*Maule* v. *Maule* (2); *Tulloch* v. *Baird* (3); *Torrie* v. *Duke of Athole* (4); *Stair* (5); *Erskine* (6); *Cuthbertson* v. *Young* (7); *Duchess of Kingston's Case* (8); *Reed* v. *Jackson* (9); *Petrie* v. *Nuttall* (10); *Broom's* Legal Maxims (11); *Taylor* on Evidence (12); *Story's* Eq. Juris. (13).

(1) Lord *Jerviswoode*
(2) 5th July, 1831; 8 Sh. 876.
(3) 21st May, 1859; 21 Dun. 807.
(4) 1 Macq. 65.
(5) 2, 7, 10.
(6) 2, 2, 5.
(7) 13 Dun. 1308.
(8) 2 Smith's Lead. Cas.
(9) 1 East, 355.
(10) 11 Ex. 569, and 25 L. J. (N.S.) 200.
(11) Page 322.
(12) §§ 1495-6.
(13) Vol. ii. s. 858.

The *Attorney-General* (1) and Mr. *Anderson*, Q.C., for the Respondents, argued that the decree of absolvitor bound the Appellant, having been pronounced after *litis contestation* with those who were entitled to represent him. The action was of a popular character, having for its object the vindication of a public right. The public were, in fact, the Pursuers, through the instrumentality of certain named litigants; consequently, an absolvitor from its conclusions was effectual against all the world. Were this not so, when would litigation terminate? The following authorities were cited for the Respondents, namely:—*Stair* (2); *Erskine* (3); *Rutherford* v. *Nisbet* (4); *Greig* v. *Kirkaldy* (5); *Leven* v. *Cartwright* (6); *Gray* v. *McHardy* (7); *Torrie* v. *Duke of Athole* (8); *Hopetown* v. *Ramsay* (9).

THE LORD CHANCELLOR (10):—

My Lords, the interlocutor in the former action having been the result of a compromise between the parties, it cannot be considered as a *judicium;* nor can it be admitted as *res judicata.*

I confess, however, that there is one part of the question on which I entertain very considerable doubt, and that is whether any individual may constitute himself the representative of the public in an action of declarator of a public right of way, so as to preclude an action by any other person, and to make the plea of *res judicata* a bar to such action. But, my Lords, whatever doubt I may entertain on that point, I feel so much respect for the opinion of the majority of the learned Judges in *Scotland,* that I desire merely to express that doubt, that I may not be supposed to agree entirely in the conclusion at which they have arrived.

My Lords, I think that these interlocutors should be reversed, and the case remitted to the Court below to be proceeded with.

LORD ROMILLY:—

My Lords, I concur in the opinion which has been expressed by the Lord Chancellor. I apprehend that, according to the English

(1) Sir John *Rolt.*
(2) 4, 39, 1, and 40, 16.
(3) 4, 3, 1.
(4) 27th Nov. 1832; 11 Shaw, 123.
(5) 21st May, 1851, 13 Dun. 975.
(6) 12th June, 1861; 23 Dun. 1038.
(7) 4th June, 1862; 24 Dun. 1043.
(8) 1 Macq. 65.
(9) 5 Bell, 69.
(10) Lord *Chelmsford.*

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law, no party would be precluded in such a case as the present by a prior judgment; and that all the effect that could be given to it would be that that judgment should be given in evidence upon any subsequent trial of the question. But, though that be so, I cannot but remember that the English law is not familiar with that form of action (which appears to me a very desirable one) which obtains in *Scotland*, called an action of declarator, in which the whole question of the right may be gone into. And I am by no means prepared to say that if the question had been fully gone into and fully discussed, and the Court had come to a judicial decision on the subject, that decision would not have bound all persons subsequently who attempted to try the same question. In many parts of the argument which has been put before your Lordships by Mr. *Scott* (certainly a most able argument) he pointed out that the Pursuers could not represent the public. If that be so, the public can never be represented in any similar action, because they must always be in the same situation, and the litigation could never be concluded. Therefore, having regard to this particular form of action, I should not be disposed to dissent from the Court below on the first point.

But on the second point I entertain a very clear opinion. *Res judicata*, by its very words, means a matter upon which the Court has exercised its judicial mind, and has come to the conclusion that one side is right, and has pronounced a decision accordingly. But when an action of declarator is brought, and a verdict is obtained by the Pursuers, which is set aside, and an arrangement afterwards takes place by which, in consideration of the payment of a sum of money, an interlocutor is pronounced for the Defenders, and the Court simply registers that interlocutor, without expressing any judicial opinion on the subject, I am of opinion that it is contrary to all principle to consider that such a transaction can be treated really as *res judicata*. It is admitted that it cannot be *res judicata* if it is done by collusion or by fraud. It is argued that in this case no fraud is alleged or proved; but it is very difficult in any case of this description to prove fraud; and if this were held to be a judgment binding strangers, by reason of its being *res judicata*, it would follow that in every case, where any person had brought an action of declarator, which had been com-

promised, the public would be bound unless some stranger could prove that the judgment had been obtained by fraudulent collusion between the parties. I am of opinion that this is not the meaning of *res judicata* according to the law of any civilized country. I am also of opinion that it was not competent for the Court in the present proceeding to go into the question whether this was a reasonable compromise or not. It was impossible that the Court could ascertain that. In my opinion *res judicata* signifies that the Court has, after argument and consideration, come to a decision on a contested matter; here the Court exercised no judicial function upon the subject. It has merely exercised an administrative function by recording the interlocutor which had been agreed to between the parties.

LORD COLONSAY:—

My Lords, upon the first point which has been argued here, namely, whether in a case of this kind, a verdict and judgment obtained on the question of a public right of way, is, or is not, to be conclusive against another party attempting to try the same question, I confess I have a very decided opinion. My opinion is, that when, in a case of this kind, an action of declarator to establish a public right of way is fully and fairly tried upon the issue—whether it is a public right of way or not, the verdict and judgment upon that point, when allowed to become final, conclusively settles that question as regards the public.

My Lords, I apprehend there is a material distinction between the law of *Scotland* and the law of *England* in regard to this matter, I mean as to the mode of raising and trying the question. I am not aware that in the law of *England* there is any such thing as an action of declarator to establish a right of public way, open to any individual in the community who may choose to raise it; but there being such a right open by the law of *Scotland*, then comes the material question whether, by the same law, there be not also a check to the repeated revival of such an inquiry. It is because the door is so widely open that there is and must be a mode of shutting that door in due time; and, I apprehend, the dicta we have on this subject are very clear and conclusive. We have the dictum of a very eminent Judge, Lord *Fullerton*, indi-

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cated in two cases (1); and we have the doctrine enunciated, I think, by Lord *St. Leonards* in one case (2), leading to the same result—that if the question is tried, say at the instance of the heritor, in order to have a declarator upon the question of a public right of way, and if that action has been instituted against parties who truly have an interest to maintain the public rights, a judgment in his favour in that action would be a conclusive judgment.

Now, in this particular case the parties who raised the action of declarator were the parties who, perhaps, of all others had most interest in having this public right of way established, I mean the inhabitants of *Elgin*, or those who represented the inhabitants of *Elgin*, and some other persons who resided in the neighbourhood. If the case had gone on to a conclusion in the ordinary course by a verdict and judgment, and if, for instance, the verdict had been in favour of the heritor in this case, instead of against the heritor, and had become final, it would have been conclusive, because the interest of the public was fairly represented. What we look to, in such a case, is, whether the interest has been fairly represented. If it has been fairly represented, then that interest is for ever concluded by the verdict and judgment.

But it may be a different matter if, when an action of this kind has been instituted, something is done by arrangement of the parties which interferes with the ordinary course of justice, and takes the case practically out of the hands of the Court.

I do not think there has been any case cited, or that there is any case to be found in the books, adverse to the decision that has been pronounced upon the first point in the present case. The only case that has been at all relied on is one in which a question was raised as to *lis pendens*. That was not a judgment on this point. The question there was, whether a second action raised while the first was in dependence was to be allowed to be proceeded with, or whether it was to stand over until it was seen whether the first action was proceeded with fairly. If the parties who brought the first action had sold or betrayed the interest of

(1) *Greig* v. *The Magistrates of Kirkaldy*, and *Maule* v. *Maule*; 5th July, 1831.

(2) *The Duke of Athole* v. *Torrie*; 1 Macq. 65.

the public, or had abandoned the case without cause, then there would have been no *res judicata*, and the second action might have been allowed to go on. But it was not decided that, if the first case was fairly tried out, the second case would be allowed to proceed further. It was no judgment upon that point. I think that all our authorities, and the dicta of Judges, go to this, that where a case is tried in reference to an interest, and that interest has been fairly represented, others who stand in the same interest are not entitled to renew it. That principle is not peculiar to questions of public way. It is recognised in other cases where there are class interests. Now, what is the interest here? The interest is the interest of the public in this right of way. And what is the conclusion sought by the action? To have it declared that there is this alleged public right of way. The question at issue is,—public right of way or no? What right had the Pursuers in this action to try that question? As members of the public they had a right and interest to try it, and as such they were allowed to try it. In that trial they stood upon and represented the interests of the public. Therefore, I am clearly of opinion that the judgment was right upon the first point.

But then comes the second point, namely, whether by reason of the compromise or transaction between the parties the same effect can be given to the judgment in all respects as if the case had been allowed to proceed in due and ordinary course. That was considered in the Court below as a question of great difficulty. Every one of the Judges expressed his opinion upon that question with hesitation. I myself, in the Court below, expressed my opinion upon that point. I by no means entertained a confident opinion upon it, though I was not disposed to alter the judgment of the Lord Ordinary. I have now heard the case argued again, and I feel that there is an element in it which I am bound to say I think may be founded upon as sufficient to sustain the judgment proposed by my noble and learned friend; I mean that there was something given for the settlement of the case; it was, to a certain extent, purchased. Now, that is a point which, I think, may be regarded as displacing the ordinary course of procedure. Another course might have been followed by the Defenders in the action, they might have followed out the notice

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they gave for trial by a special jury; and if they had obtained a verdict, or if the other party had failed to maintain their action, the case might have stood in a different position. But when the Defenders in the action, the heritors, give something to the other party for allowing them to obtain a judgment, that introduces an element as to which I cannot say that it does not sufficiently sustain the decision about to be now pronounced.

THE LORD CHANCELLOR:—

I apprehend that your Lordships are of opinion that the interlocutors ought to be reversed, and that the case must be remitted to the Court of Session to be proceeded with.

LORD COLONSAY:—

If the case is remitted to the Court of Session to be proceeded with, it will start from the point at which it was when the Lord Ordinary pronounced his interlocutor, which has been brought under review, and which was affirmed by the Inner House. The other inquiry is left open.

*Interlocutors reversed; and cause remitted to the Court of Session to be proceeded with.*

Solicitors for the Appellant: *Holmes & Co.*
Solicitors for the Respondents: *Martin & Leslie.*

NICOL *et al.* . . . . . APPELLANTS; 1867 *May* 14.

AND

PAUL . . . . . RESPONDENT.

*Ancient Decrees—Their Interpretation.*

A liberal interpretation should be given to the language of decrees which have been supported by long usage, and by the acquiescence of parties who had an interest in disturbing them.

But when it appears plainly on the face of a decree that certain things are omitted, no rule requires that the omitted things shall be deemed to have been included.

*Teind* (1)—*Claim on Land formerly waste, but now made productive.*

Waste land overlooked in ancient decrees for teind becomes subject to teind when rendered productive by modern cultivation.

Against the demand of a parish minister claiming teind, certain ancient decrees were produced by the heritors to shew that the lands sought to be fixed had already been charged; but as the decrees did not appear to have been exhaustive, the Court of Session (acting as a Court of Teind), ordered an inquiry, and their order was affirmed by the House:—

*Held*, however, that where a decree for teind purports in terms to have valued all the lands of a parish, no question can afterwards be raised as to any of the lands which it embraces being teindable.

IN 1862, the Respondent, as minister of the parish of *Banchory-Devenick*, in the county of *Aberdeen*, brought an action against the heritors for an augmentation of his stipend. The case came before the Lords of Council and Session as Commissioners of Teinds.

The heritors resisted the claim, contending that the teinds of the parish had been duly valued, and that the ascertained amount of them was satisfied by the existing stipend. In support of this contention they relied on certain decrees of valuation, and on the fact that for upwards of forty years the teinds had been regarded as exhausted, and that the minister had, during that period, annually drawn sums from the Exchequer in aid, or in supplement, of his receipts from the teinds.

By the law of *Scotland*, as laid down by Mr. *Buchanan* (2), teinds are due from all cultivated and pasture lands, being one-fifth of the rental, unless the amount payable by the heritors has been fixed in

(1) Tithes. (2) Law of Teinds, p. 53.

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a suit for valuation. The question was, whether there had been such a valuation and such an acquiescence as barred the demand.

The Court of Session (Second Division) directed an inquiry, in so far favouring the minister's claim; and hence the present appeal by the heritors.

The *Lord Advocate* (1), Sir *Roundell Palmer*, Q.C., and Mr. *Forbes*, appeared for the Appellants.

The *Attorney-General* (2), and Mr. *Hall*, for the Respondents.

The merits of the question, and the grounds on which the House disposed of it, appear very clearly from the following opinions.

LORD CRANWORTH:—

My Lords, the proceeding in this case was instituted by the Rev. *William Paul*, minister of the parish of *Banchory-Devenick*, in the county of *Aberdeen*, and its object was to have an increase of his stipend fixed upon certain lands in the parish which he alleged to have never been valued for teind (3). The minister lodged a minute in Court, stating that there were unvalued lands in the parish, the rental of which he alleged to be £4960. And if that were so, then the teinds would be capable of being augmented to the extent of one-fifth, which would be about £500.

The Lord Ordinary made a remit to the teind clerk to inquire whether there were any free teinds, and the teind clerk reported that there was undoubtedly a certain amount of free teinds, and that if the unvalued moss and grass lands were to be taken into account, there was a considerable amount of free teinds. Upon that, the Lord Ordinary, without expressing any opinion himself, or hearing any argument, remitted the case to the Inner House, and the Inner House, shortly afterwards, appointed the minister to condescend articulately upon the lands which he alleged were subject to teind. That was done, and, afterwards, answers were put in by the heritors; and then, before going into proof, an argument was had before the Inner House which was very much in the nature of an argument upon relevancy, the question being whether, sup-

(1) Mr. *Gordon*. (2) Sir *John Rolt*. (3) Tithes.

posing the statement of the condescendence to be true that there were lands unvalued, the minister had made out to the satisfaction of the Court that he was entitled to have, and ought to have, an augmentation of his stipend. The Inner House declared the stipend to have been, for the year 1862, of a certain specified amount, and concluded by

> Declaring that this modification, and the settlement of any locality thereof, shall depend upon its being shewn to the Lord Ordinary that there exists a fund for the purpose.

The cause having been remitted to the Lord Ordinary, the parties went into proof, and the Lord Ordinary reported that the question—whether there were or were not free teinds—depended on the question, whether the decrees of valuation relied on related to the whole lands, or only to parts of them. Substantially, he may be taken to have found for the heritors, that is, the Respondents, *in omnibus*, against the claim of the minister.

It is necessary to call your Lordships' attention shortly to the condescendence and to the answers in this case. The condescendence on the part of the minister averred, in distinct articles, that particular lands in the parish which he set forth had never been valued for teind, and therefore remained liable to his demand. The answer of the heritors was, that all the lands on which he so condescended had, in substance, already been valued, and, therefore, none remained liable.

The question is eventually narrowed to the point whether, in respect of two particular portions of land, the barony of *Findone*, or some of the lands therein, and the barony of *Portlethen*, the heritors have or have not made out that the whole of those lands had been valued for teind. The heritors relied, in respect of the barony of *Findone*, upon a decree of valuation made in 1682, which they contended embraced the whole barony of *Findone*. With regard to the barony of *Portlethen*, they relied upon a similar decree made in 1709, which they contended exhausted the whole barony of *Portlethen*.

The statement of the minister with reference to *Findone* is as follows:—

> A large extent of the lands and barony having been at the date of said decree uncultivated, and partly in moss, was not included in the decree along with the

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arable lands, which alone were thereby valued, and in respect of which the tenants paid victual rent. The waste or moss lands were unvalued, but have now been improved and converted into teindable subjects.

With regard to *Portlethen*, the minister asserted that a great part of it was uncultivated, and either in moss or grass, and had since been reclaimed and become teindable. The Lord Ordinary decided in favour of the heritors. But the Inner House, on the 5th of February, 1865, pronounced the following interlocutor, now appealed against:

Recal the interlocutor complained of, in so far as regards the objections stated by the minister in the 10th, 11th, and 14th Articles of the revised condescendence" (as to *Findone* and *Portlethen*); "and Find, that according to the true construction and effect of the decree of valuation of 1682, the teinds of those portions of the barony of *Findone*, if any, which are not embraced within the special subjects enumerated in the rental produced by the Pursuer, and adopted as the basis and limits of the decree of valuation, are unvalued: Find, that the teinds of the lands of *Barclayhill*, *Calsayend*, and *Meddens*, mentioned in the said decree, are not valued by said decree: Find, that the terms of said decree are not such as to exclude a proof or inquiry, before answer, that the teinds of the parcels of lands mentioned in the 11th Article of the condescendence, or any of them, are unvalued: Finds, that according to the true construction and effect of the decree of valuation of 1709, the teinds of those portions of the barony of *Portlethen*, if any, which are not embraced within the special subjects enumerated in the prepared state of the proof which forms the basis and limit of the decree of valuation, are unvalued: Remit to the Lord Ordinary to direct such inquiry as may be rendered necessary by this interlocutor, and to proceed further as shall be just.

The ground on which the Inner House proceeded was, that it did not appear on the face of the decrees of 1682 and 1709, that the lands which were thereby valued for teinds must of necessity include all the lands referred to by the minister's condescendence.

Where a decree purports in terms to have valued all the lands of a parish for the purpose of ascertaining the teind to which the heritors are liable, no question can afterwards be raised as to any of the lands which it embraces being teindable. The decree concludes everything. So where it purports to have valued any part of a parish known by some general designation, as a barony, no question can be afterwards raised as to the lands included under that designation, except by shewing that the lands now passing under that designation comprise subjects which did not form part of what was valued under that same name by the decree.

The Court below were of opinion that, though the lands valued might possibly have comprehended the lands now sought to be charged, yet that was not the necessary construction of the decrees.

The Court, therefore, allowed the parties to go to proof.

The ground on which the Appellants complain of this ruling is, that the decrees, fairly interpreted, do necessarily comprise all the lands which at the respective dates of the decrees constituted, and now constitute, the barony of *Findone* and the barony of *Portlethen*. Whether they are warranted in this contention depends entirely on the true construction of the decrees themselves. I have satisfied myself that the interlocutor complained of properly admitted the parties to proof; and my opinion is, that it was in all respects right, and I move that the appeal be dismissed, with costs.

LORD WESTBURY:—

My Lords, the suit, and the determination of it, are matters of very great concern generally to the heritors in *Scotland*. No doubt, the payments made by them and the value of their estates have for a long period of years been calculated upon the belief that these decrees of valuation would not be lightly disturbed. And I think it very desirable that the principle should be established that a very liberal interpretation should be given to the language of these decrees, so as to support long usage, and the conclusions that fairly may be derived from the acquiescence of persons who had an interest in disturbing them if not well founded.

Where, therefore, there are general words of designation found in a decree of valuation, which may fairly be considered as comprehending a whole district, such as a parish or barony, effect should, I think, be given to those general words.

But the decree appealed from in the present case rests upon a rule of construction which preserves unaffected the general principle to which I have referred.

The argument of the Appellants was, that inasmuch as the word "barony" occurs in the libel, the barony, as an entire thing, must be considered as comprehended in the words "the lands libelled;" and so it might have been if these words had not been followed by a specific enumeration. I think the words of the decreet plainly

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carry on the face of them sufficient evidence that the valuation is confined to the lands which are specified, and that it was not intended to take into consideration the generality of the word "barony;" or to embrace the other lands, then uncultivated, which might be included within the precincts of the barony.

Notwithstanding, therefore, the general rule, which I trust will be adhered to, of giving, in favour of long usage and acquiescence, a liberal interpretation to the words of the decree, yet as the decree in the present case carries on the face of it clear evidence that none but certain specific lands were taken into account, I think it is impossible to give to the decree a greater extent.

I concur in the observations of my noble and learned friend, and think it unnecessary to add anything to what he has said.

LORD COLONSAY:—

My Lords, I have felt considerable anxiety in regard to the course that should be taken in this case; and I have heard with very great satisfaction the observations which have now been made by my noble and learned friend who last addressed the House as to the importance of supporting decreets of valuation when they can fairly and properly be supported, and these observations apply with additional force to decreets which are in the predicament in which this decreet is. For your Lordships may perhaps have observed that this is one of the many decreets, the proceedings in regard to which were destroyed by a calamitous fire a long time ago, and which were endeavoured to be set up, to the best ability of the country at the time, by ordering such extracts of those decreets as had been given out to be brought back into Court, and by forming from these extracts a record of those decreets. But one effect of that destruction by fire is, that materials which might otherwise have been referred to in order clearly to explain or to support the decreet, are no longer accessible and available for the purpose. If, however, it appears on a fair reading of the decreet that a part only of the lands mentioned in it were valued; still more, if it appears from positive statement on the face of it that certain lands were not valued, then I apprehend that the Court has no other course than to hold that these lands stand unvalued, and whether the reasons assigned for not having valued them are valid reasons

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or not, the fact remains that they were not valued, and the Court must deal with them accordingly.

In the present case, the judgment of the Court has dealt with two classes of lands mentioned in the decreet. It has held that, with regard to one of them, the decreet shews that that class of lands was not valued at all. I perfectly concur in that finding of the Court. I think it is plain upon the face of the decreet that those parcels of land were not valued, but were excluded from valuation. For the decreet says that "as to the rent of the said lands of *Barclayhill, Calsayend,* and *Meddens,* and money rent of *Badentoy,* the said Commissioners find and declare that the rent of the said lands is not lyable in payment of teind duty, the samen being payed upon the accompt of moss maill alleuarly." It is quite true that they had no power to pronounce any lands free from teind, and a finding to that effect, if it did nothing else, would be simply inept; but the meaning of the finding here is, that those particular lands being in their opinion free from teind they had not valued them. That is the true meaning of it, and, that being so, they stand unvalued. The reason why they were not valued is assigned on the face of the decreet, and the Court will judge of the validity of the reason.

But, in regard to another portion of the lands in question—I mean the lands that are not so expressly excepted from valuation—a question involving more general principles arises, whether, taking first the case of *Findone,* the valuation is to be read as comprehending the whole of the lands libelled.

It appears from the libel that the action was brought for the purpose of having a valuation made of the heritor's lands libelled, and it describes them in this way: "That the teinds, parsonage, and vicarage of the said persewars, their lands, baroine, and others underwritten, viz., the lands and baronie of *Findone,* the lands of *Cookstoune, Calsayend, Meddens,* and *Badentoy,* with their pertinents, lying within the parochine of *Banchory-Devenick* and sheriffdome of *Kincardine,* are yet unvalued." There *Calsayend, Meddens,* and *Badentoy,* are not stated as parts of the barony of *Findone,* but the lands and barony of *Findone* are also brought forward to be valued. Now, what was meant by the lands and barony of *Findone?* It is said to be not uncommon to talk of all the lands in a barony, and

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the barony itself, cumulatively, as the lands and barony of so-and-so. That is the construction which the Lord Advocate endeavoured to put upon the words "the lands and barony of *Findone*" as they occur here. But I think it is clear that there may be lands of *Findone* which form a part, and only part, of the barony of *Findone*, that the *barony of Findone* may comprehend other lands besides the *lands of Findone*, and I think it appears that there were lands in the barony of *Findone* which were not part of "the lands of *Findone*," because I observe it is stated in the record and not contradicted; and it seems to be assumed by the parties, that the lands of *Barclayhill* formed part of the barony of *Findone*, and they are not dealt with in the decreet as part of the lands of *Findone*. It is thus made clear that the expression "the lands and barony of *Findone*," does not mean the same thing as "the lands of *Findone*," because the barony of *Findone* comprehended at least *Barclayhill*, which was not part of the lands of *Findone*, and it may have comprehended other lands which were not part of the lands of *Findone*.

The minister, the Defender in the present action, says that there were a great many other lands besides *Barclayhill* which were not part of the "lands of *Findone*;" and when we see that there was one parcel of land which was part of the barony of *Findone*, but which did not form part of the lands of *Findone*, and was not valued, it is not unreasonable to suppose that inquiry may shew that there were other parcels in the same condition. The minister says that there were, and he has specified a number of such lands in Article 3 of his condescendence.

Now all that the Court has done is to say that this decreet does not exclude inquiry, and that inquiry should be made. That is the whole extent of the judgment, and I think that is a reasonable judgment. The Court has not said upon whom the onus may rest, or how long the onus may rest, upon the Pursuer or upon the Defender. That is left open for consideration. It may shift in the course of the inquiry. Some evidence may be adduced which will throw the onus upon the one side, and other circumstances may be proved which may throw it upon the other side. It is upon the balance of the whole evidence that the Court has eventually to determine whether, upon a fair construction of this

decreet, it did or did not comprehend any of those parcels of land which the minister describes in Article 3 of the condescendence.

Then, with regard to the barony of *Portlethen*, the same general observations apply, though the special circumstance I last alluded to does not occur in that case. But the same principle applies. I may, however, observe that I think it would have been better if, in making up the record, the minister had been required to condescend upon the particular lands in the barony of *Portlethen*, which he says were not valued for teinds. He has done so in regard to *Findone*, but he has not done so in regard to *Portlethen*. Had this been done, it would have limited the inquiry to those particular lands. That, however, may still be open to correction. I do not think that we can alter the judgment by reason of that not having been done. The record does not appear to have been objected to on that account.

Upon these grounds, my Lords, I am of opinion that the judgment which has been suggested by your Lordships is the correct one. In regard to *Findone*, I observe it stated in the condescendence, and apparently in the opinions of the learned Judges in the Court below, that the decreet was based upon the rental produced by the heritor. I am not quite sure that that was so, for as I read the decreet of valuation it states that the minister produced another rental, and it rather appears that he referred that rental of his to the oath of the heritor, and that the heritor deponed upon that rental. Now, it was upon the result of that oath that the valuation proceeded, and we have not before us either the oath or the rental produced by the minister. They are probably among the things that have vanished. That is one of several reasons why there may be difficulty attending the inquiry, but I do not think it affects the merits of the judgment that has been proposed.

*Interlocutor affirmed, and appeal dismissed with costs.*

Solicitor for the Appellants: *W. Robertson.*
Solicitors for the Respondent: *Martin & Leslie.*

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MR. AND MRS. DIGGENS . . . . . APPELLANTS;

AND

GORDON *et al.* . . . . . RESPONDENTS.

*Conquest—Ante-nuptial Trust.*

The word "conquest," when used as a verb active, and not as a noun substantive, has a wide and flexible signification.

Where a lady had, by ante-nuptial settlement, assigned and conveyed to trustees whatever she might "conquest or acquire" during the marriage:—

*Held*, that the words, "conquest" and "acquire," so used, were sufficient to pass to the trustees property of every kind which during the marriage had come to her by succession.

*Costs—Appeals not encouraged.*

That expenses have not been awarded in the Court below, is no reason for refusing costs when the decree complained of is affirmed. To rule otherwise would but encourage litigation.

BY ante-nuptial settlement, the above Appellant, Mrs. *Diggens*, assigned and conveyed to trustees whatever property she might *conquest or acquire* during the marriage. She succeeded, *stante matrimonio*, to a moiety of her father's estate, and to £1500, which the Respondent, as the sole acting trustee, claimed for the purposes of the settlement. Mrs. *Diggens* resisted the claim, asserting that she had not "conquested or acquired" the property in question so as to bring it within the operation of the trust. Her chief argument was, that the words "conquest" and "acquire" designated the earnings of her industry, her genius, or her economy; but had no reference to what might come to her by succession, donation, or inheritance.

The Lord Ordinary decided in her favour, but the Second Division gave judgment against her; whereupon she, with the concurrence of her husband, appealed to the House.

The *Attorney-General* (1), Sir *Roundell Palmer*, Q.C., and Mr. *Anderson*, Q.C., were heard for the Appellants.

Mr. *Giffard*, Q.C., and Mr. *Young*, for the Respondents.

(1) Sir *John Rolt*.

The following opinions set forth fully the facts of the case, the merits of the question, and the grounds of the ultimate decision.

THE LORD CHANCELLOR (1):—

My Lords. Under the marriage contract of Mrs. *Diggens's* father and mother, dated the 27th of March, 1828, the father (*Ralph Compton Nisbet*), after binding himself and his heirs and executors to pay to his wife, in case she survived him, an annuity of £150, for securing such annuity bound and obliged himself to settle and vest a heritable bond for £3000 in trustees, the interest to be paid to himself during his life, and after his death to be applied in payment of the widow's annuity; "and the principal sum, after the death of both the parties, to go to the child or children of the marriage, but in such proportions and at such times as the father might direct by a writing under his hand, and failing of such writing to be divided equally amongst the children of the marriage."

There were two daughters of the marriage. The father having survived his wife, by a deed of direction dated the 11th of July, 1855, appointed one half of the £3000 above mentioned to the Appellant by her then name of *Mary Wilhelmina Nisbet*, reserving his own life-rent; and the deed contained these words: "I dispense with the delivery hereof, and declare these presents to be good, valid, and effectual although found lying by me, or in the custody of any other person to whom I may intrust the same, undelivered at my death."

*Mary Wilhemina Nisbet*, now Mrs. *Diggens*, by her ante-nuptial contract of marriage with Mr. *Diggens*, dated the 4th of January, 1860, assigned, disponed, conveyed, and made over to trustees (of whom the Respondent *Gordon* is the sole acting one), "all sums of money, goods, gear, and effects, and heritable and moveable estates of every description, wheresoever situated, which she might *conquest or acquire* during the subsistence of the intended marriage."

On the 2nd of November, 1863, the father, Mr. *Nisbet*, died intestate, leaving heritable and moveable estates of considerable

(1) Lord *Chelmsford*.

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value, to which the Appellant, Mrs. *Diggens*, and her sister, became entitled under "the deeds of directions," in equal moieties.

The questions upon the appeal are, whether the sum of £1500, appointed to Mrs. *Diggens*, and the moiety of her father's heritable and moveable estates, belong to the Respondent, as trustee under the Appellant's marriage contract, as having been "*conquested or acquired* during the subsistence of the marriage."

In the construction of every instrument, whether will or deed, words must *primâ facie* be assumed to have been intended to be used in their ordinary sense; and if they have a technical meaning that meaning must likewise prevail, unless it is apparent from the context, or from the whole purview of the instrument, that they require a different interpretation.

The word "conquest," is a word of technical signification, and, according to Mr. *Bell*, in section 1974 of his Principles of the Law of *Scotland*, "when used substantively in marriage contracts, comprehends whatever is acquired, whether heritable or moveable, during the marriage by industry, economy, purchase, or donation; but not what comes by succession, or legacy, or accession to a subject already acquired."

The ordinary provision of conquest inserted in marriage contracts applies only to the husband's acquisitions during the marriage. Lord *Cowan*, in his judgment in this case says, "A provision made by a wife of her conquest during the marriage is unprecedented, and so far as any known style of contract of marriage can be relied on, or any reported decision on questions of the kind discloses, there is no instance on record of a wife providing in general terms, or specifically 'conquest' in its limited sense, to her husband and children."

A wife (as was observed in argument) may acquire considerable sums during the marriage by the exercise of her musical or literary talent, or by carrying on business; but, as the Lord Justice *Clerk* remarks, "She cannot in any legitimate sense conquest or acquire anything; because whatever she acquires of moveable property passes to her husband, and if any heritable estate comes to her by succession that would not be conquest, and if by donation that would be the very opposite of conquest of the marriage."

Of course provision might be made respecting a wife's acquisi-

tions during the marriage under the term "conquest" in a marriage contract, if it was clear that the word was meant to be used in the same technical sense as when applied to a husband's acquisitions. But the absence of any precedent of a deed in which a wife has made provision for her conquest, in the same sense in which a husband's conquest is provided for, raises a presumption that when the technical word is found in a clause in a marriage contract dealing with the wife's property, it is not intended to be used in its strict and technical sense.

The word in the present case is not used substantively, but as a verb; as to which Mr. *Bell*, in section 1975, says: "The word conquest is also sometimes used as a verb 'what we shall conquest or acquire,' or its meaning is qualified by descriptive words, and the extent varies with the expression." By this I understand that the word "conquest" when used as a verb is more flexible than when used as a substantive. Being then at liberty to depart from the technical sense of the word, if there is a manifest intention that it was not to be technically applied, the question arises whether in the deed itself sufficient grounds are not to be found for the adoption of a different construction.

In an ordinary provision of conquest, the husband is the absolute proprietor during his life of everything which comes under that denomination, and may dispose of it during his lifetime for onerous causes; but not gratuitously. Every acquisition made by the wife during the marriage belongs to him, unless his *jus mariti* is excluded. There is nothing in the smallest degree analogous to this in the marriage contract of the Appellants. The whole of the wife's heritable and moveable estates of every description which she may "conquest or acquire," are assigned to trustees, and they are empowered, with the consent of the wife alone, to sell any of the heritable estates, and convert them into money, both the parties binding themselves to execute all deeds necessary for vesting the heritable estates in the trustees; and the husband is deprived of the power of touching the smallest portion of the property.

Such a trust as this is utterly at variance with a provision of conquest. From the nature of the deed in its constitution of this trust, and from the character of its provisions, I am satisfied that

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the words "conquest" and "acquire" were not used in a strict and technical sense, but were meant to comprehend every thing which might fall to the possession of the wife during the marriage. This will include the £1500 acquired under the deed of direction of the 11th July, 1855, as well as the moiety of the father's heritable and moveable estates. I therefore agree with the Judges of the Second Division, and think their interlocutor ought to be affirmed.

LORD CRANWORTH:—

The questions, whether the £1500, and Mrs. *Diggens's* share in the heritable and moveable estate of her father, were duly assigned by her to the trustees appointed by the ante-nuptial contract entered into on her marriage.

The question turns entirely on the point whether the property to which she so became entitled passed under the description of heritable and moveable estate *which she might conquest or acquire* during the subsistence of the marriage. The Court below held that it did; but the Appellants dispute the correctness of that decision, on the ground that property to which she succeeded as heir, portioner, and next of kin of her father, or to which she became entitled under her father's deed of direction, is not *conquest* according to the Scotch law.

It cannot be disputed that when, in a marriage contract, the intended husband makes in the ordinary form a provision of conquest in favour of his wife or children, the word "conquest" has a well established definite meaning, which I assume would not include any part of that to which Mrs. *Diggens* became entitled on her father's death. A provision of conquest seems to have been an ancient mode of making a settlement for the benefit of wife and children, sufficient, probably, in early times, but ill suited to the exigencies of the present day. It was founded, as I collect from the opinion of the Lord Justice *Clerk*, on the hypothesis that the spouses were bound together in a sort of partnership, to endure during the marriage, and then at the death of the husband the result of their gains during the marriage, whether from industry, frugality, or purchase, was to be ascertained. This was analogous to the profits of a commercial partnership, and the result was

treated as the "conquest" on which the contract of the husband in favour of his wife and children attached.

But it is impossible to attribute to the word "conquest," as used in this marriage contract, the same meaning as that which attaches to it in an ordinary provision of conquest by a husband. What is to constitute conquest, properly so called, cannot be ascertained till the death of the husband; but here the assignment of what the wife shall *conquest or acquire* operates immediately on the accruing of her title to the property assigned. It is all to be held by trustees during the marriage, on trusts irreconcilable with her retaining, or her husband retaining, any power or control over it. The argument, however, of the Appellants was, that though the incident of conquest, properly so called, to which I have referred —I mean its leaving everything under the husband's control until his death,—might be inapplicable to the assignment contained in this settlement, yet it would be right to interpret the words "which he may conquest or acquire," as embracing only such things as constitute conquest, properly so called.

Now, it is admitted on all hands that a provision of conquest by a husband does not extend to or affect any heritable or moveable estate which may come to him during the marriage by succession or legacy; and therefore, reasoning by analogy, the Appellants contend that the words used in this ante-nuptial contract ought not to be taken as extending to the share of her father's heritable and moveable estate to which she succeeded on his death. I cannot agree to this argument. If no technical meaning is to be attributed to the words "*conquest or acquire*," no one would hesitate to say that a married daughter when her father dies and leaves a large property which descends on her, *acquires* that property during the marriage. She certainly acquires it at some time, and if she does not acquire it during the marriage, when does she acquire it? No authority has been produced to shew that any technical meaning has ever been attributed to these words "conquest or acquire," except in the case of a provision made by the husband, when from the nature of the contract into which he is entering, the word "acquire" cannot have its ordinary meaning.

Even if it were necessary to adduce arguments to shew that the word "acquire" ought to have its ordinary meaning attri-

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buted to it, there are cogent arguments on the face of the deed leading to that conclusion. In the first place, the assignment here is by the intended wife, not by the husband; and it is highly improbable that a lady, one of two only daughters of a gentleman of fortune, should, on her marriage with an officer in the navy, think of entering into an engagement to settle what she should earn during the marriage by her own personal talents or exertion. Arguments were ingeniously put to shew that she might, during the marriage, as an authoress or an artist, earn large sums to which she might intend her contract to refer. This seems to me highly improbable, and quite inadequate to justify the Court in giving to the words used a technical instead of their ordinary meaning. Besides which, as was truly said at the bar, all which a married woman might so earn would from time to time, as it might be realized, become the property of the husband.

But what seems to me to shew conclusively that it is not to earnings or acquisitions in the nature of *conquest*, technically interpreted, that the deed referred, is the circumstance that the property assigned is to go to trustees, who are to deal with it during the marriage in the mode prescribed by the contract. This is inconsistent with conquest in its technical sense. It was admitted that there is no authority for holding that a provision of conquest had ever been made the subject of an assignment to trustees; and I am persuaded that no such case does or can exist. Such a trust would, in fact, be inconsistent with the nature of conquest. On these grounds I think that the decision of the Court below was right.

It was argued, however, that different principles may be applicable to the £1500 to which the wife was entitled under her parents' marriage contract, and the deed of direction executed by her father. The argument was, that though the precise amount to which she eventually became entitled was not ascertained till after the death of her father in 1863, yet she had an absolute indefeasible title to some part of the £3000 secured by the marriage settlement of her parents to their children; and so, it was contended, she could not be said, in any sense, to have acquired that sum during the marriage. But this is a very subtle refinement. She had not any part of the £3000 at the time of the

marriage, and it is reasonable to understand her contract as extending to everything not then in her possession, but which should come to her by any means during the marriage. She makes over to the trustees a small sum of bank stock of which she was possessed at the time of the marriage; and the reasonable construction of the language used is, that she meant to deal with all of which she should afterwards become possessed in the same mode in which she dealt with that which she already possessed.

My opinion is, that the interlocutor of the Inner House ought to be affirmed.

LORD WESTBURY concurred.

LORD COLONSAY:—

The attempt, in this case, to put on the word "conquest" the particular construction which the Appellants contend for, is, to my mind, a perfect novelty. The word "conquest" here occurs in a marriage contract, and it is introduced into that marriage contract with two accompanying circumstances, which prevent me from giving to it the interpretation that the Appellants contend for. In the first place, it has reference to what may be acquired by the wife. That in a marriage contract is a novelty; and it would be very difficult of application; I would say almost impossible of application, if the word "conquest" be taken in the sense in which it is understood in reference to a provision of "conquest" in a marriage contract. In the second place it is an immediate conveyance to trustees to be operative during the subsistence of the marriage. That again is entirely inconsistent with an ordinary provision of conquest in a marriage contract. These two circumstances seem to me to take the word "conquest" out of the interpretation which the Appellants contend for. I am not quite certain whether the Appellants contend for the interpretation of "conquest" in this marriage contract in the same sense in which "conquest" provided by a husband is understood—or, in the limited sense in which the word "conquest" is held to be applicable to heritable rights; but they endeavour to make that particular meaning of the word "conquest" communicate itself to the next succeeding word "acquire;" so that the word "conquest"

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is to destroy the ordinary meaning of the word that next follows it. The use of the word here was simply a mistake; because in its strict technical sense it would lead to a construction contrary to all precedent, contrary to law, and it might, I think, lead to contending for impossible consequences. But if you get rid of the technical meaning of the word, the meaning of the contract itself, and the purpose and object of the parties, are perfectly plain; it was intended to carry whatever was acquired by the wife during the subsistence of the marriage. I therefore think that the judgment of the Court below is perfectly right.

Sir *Roundell Palmer*:—Will your Lordships permit me, as you have said nothing at present about expenses, to recall to your recollection the fact that the Court below thought this a case in which no expenses should be given.

LORD WESTBURY:—My Lords, it has never been your Lordship's habit to give encouragement to appeals; and such encouragement would be given if, where no expenses have been allowed in the Court below, your Lordships adopted the course of not giving costs on appeal.

LORD CRANWORTH:—I concur with my noble and learned friend.

*Interlocutor affirmed, and Appeal dismissed with Costs.*

Solicitor for the Appellant: *William Robertson.*
Solicitors for the Respondent: *Martin & Leslie.*

THE WESTERN BANK OF SCOTLAND, WITH ITS LIQUIDATORS . . . . . } APPELLANTS;
ADDIE . . . . . RESPONDENT.

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May 20.

FIRST AND SECOND APPEALS.

ADDIE . . . . . APPELLANT;
THE WESTERN BANK OF SCOTLAND, WITH ITS LIQUIDATORS . . . . . } RESPONDENTS.

2 H.L. 329
33 J.-S. 344

CROSS APPEAL.

*Joint Stock Company—Sharetaking Contract—Fraud—Irrelevancy of the Allegations—Doctrine as to Companies, Directors, and Managers.*

5 Eq. 254, 469

Suit to rescind a sharetaking contract, and for *restitutio in integrum*, or, alternatively, for damages:—

12 Eq. 346

*Held*, under the circumstances, unsustainable.

7 Ch. 57

*Per* THE LORD CHANCELLOR:—Notwithstanding numerous irreconcilable decisions, the true doctrine seems to be, that where a person has been drawn into a contract to purchase shares by the fraudulent misrepresentations of directors, and where the directors, in the name of the company, seek to enforce that contract, or where the person who has been deceived institutes a suit to rescind it,—the misrepresentations are imputable to the company, and the purchaser cannot be held to his contract.

13 Eq. 37-
570
15 Eq. 39

*Per* THE LORD CHANCELLOR:—If an untrue statement is made, founded on a belief destitute of all reasonable grounds, or which the least inquiry would immediately have corrected, it may fairly and correctly be characterised as misrepresentation and deceit.

8 QB 24
9 Ch. 9

*Per* THE LORD CHANCELLOR:—If the directors employed the manager to make false representations as to the stability of the company, the effect would have been the same as if made by the directors themselves.

6 H.L. 38
9 Ch. 40

*Per* THE LORD CHANCELLOR:—I entertain considerable doubt whether the Pursuer in this case has connected the directors sufficiently with the alleged misrepresentations to make them imputable to the company. That the directors knew of the manager's endeavours to get the Pursuer to take shares is nowhere alleged; nor is it alleged that the manager gave authority to the local agent from whom the misrepresentations were immediately derived.

5 PC 394
403,
5 PC 405

*Per* LORD CRANWORTH:—The Court below framed issues for a jury trial; but I think no such trial was necessary, because no relevant case was stated.

20 Eq. 623,
1 Ch D 10

*Per* THE LORD CHANCELLOR:—No issues ought to have been directed.

2 Ch D. 671

*Per* THE LORD CHANCELLOR:—A company cannot retain any benefit which they have gained through the fraud of their agents.

4 Ch D. 70

*Per* LORD CRANWORTH:—Corporate bodies may be made responsible for the frauds of agents, to the extent to which they have profited by such frauds.

20 Ch D. 8
43.



5 Ch D. 449, 449 10 Ch D. 578
4 App Cas 89. 5 App Cas 319, 318, 320, 326-8, 9
CPD. 335. 6 QBD. 702 25 Ch D 150
340-2-59-62-78, 9, 341

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*Per* THE LORD CHANCELLOR :—If, instead of seeking to set aside the contract, the person defrauded prefers an action of damages for the deceit, such action cannot be maintained against the company, but only against the directors.

*Per* LORD CRANWORTH :—An incorporated company cannot, in its corporate character, be called on to answer in an action for deceit.

*Per* LORD CRANWORTH :—*Restitutio in integrum* can be had only where the party seeking it is able to put those against whom it is asked in the same situation as that in which they stood when the contract was entered into.

*Per* THE LORD CHANCELLOR :—Whether the change of a company from unincorporate into corporate, for the mere purpose of more conveniently winding up its affairs, renders *restitutio in integrum* impracticable, is a question which, if it were necessary to determine, I should wish to consider more carefully.

*Per* LORD CRANWORTH :—The incorporated company cannot be sued for frauds committed by directors before the incorporation.

*Per* THE LORD CHANCELLOR :—That the complainant was himself a member of the company whose agents had committed the fraud, would not be a valid objection to his suit for redress; nor would it be an answer that his suit might prejudice those who had innocently acquired their shares after *he* had acquired *his*.

THE *Western Bank of Scotland* was established in 1832, at *Glasgow*, under the 7 Geo. 4, c. 67 (1), as an unincorporated joint stock banking company. After an apparently prosperous career of twenty-five years, it collapsed on the 9th of November, 1857, with a deficiency of £3,000,000 sterling. On the 8th of December, 1857, for the purposes of a voluntary winding-up, the concern was incorporated and registered under the *Joint Stock Companies Act* of 1856, as amended by the *Joint Stock Companies Act* of 1857, in pursuance of an unanimous resolution passed at a general meeting of the shareholders; and liquidators were appointed.

The Respondent, Mr. *Addie*, had fifteen shares, and was interested to the extent of a moiety of other thirty shares in the company, from 1848.

In November, 1855, he purchased 135 further shares at £76 per share; making, with costs and charges, in all, £10,313 10*s*. 2*d*. He subsequently had to meet calls.

In November, 1859, he commenced the proceeding (out of which these appeals arose) against the *Western Bank of Scotland* and its liquidators, to have the "contract or bargain of sale and

(1) An Act to regulate the mode in which copartnerships for banking in *Scotland* may sue and be sued (20th of May, 1826).

purchase" of the said 135 shares rescinded, and the Pursuer "reponed and restored thereagainst *in integrum*, on the ground that the purchase of the said 135 shares had been induced by false and fraudulent representations contained in the reports of the directors." The summons concluded alternatively for £26,000 damages.

The action, though nominally against the bank, was, in effect, against the shareholders. The creditors had been paid: and one of the points of defence was, that Mr. *Addie* had for years received dividends and joined in or sanctioned the management, and taken part in proceedings affecting the constitution of the bank, as a member of a body which, by legal construction, he thus charged with fraud.

Mr. *Addie* put in the following pleas in law:—

1. The Pursuer is entitled to decree of reduction and payment as concluded for, in respect that the directors and manager of the bank made false representations to the Pursuer as to the condition of the bank, and as to the value of the shares, and in respect that the Pursuer was thereby induced to buy said shares.

2. The Pursuer is entitled to decree of reduction and payment as concluded for, because, in making the said purchase of shares, he was under essential error; and, *separatim*, because that essential error was produced by the misrepresentation of the bank, or of parties acting for and entitled to act for the bank.

3. The Pursuer is entitled to decree of reduction and payment as concluded for, because his agreement to purchase the said shares was induced by the fraud and misrepresentations of the bank, or of parties acting for, and entitled to act for the bank.

4. At all events the Pursuer is entitled to be reimbursed for, and kept indemnified against, the loss and damage he has sustained, and to that effect to obtain decree in terms of the conclusion for damages.

The following were the pleas in law of the bank and liquidators:—

1. The statements and representations alleged to have been made falsely on the part of the directors, officials, or agents of the bank, form no good ground for reduction of the transfers in favour of the Pursuer, such statements and representations having been unauthorized by the company, or by the contract of copartnery of the company.

2. The Pursuer having been himself a shareholder of the company at the date of the alleged false representations, is not entitled to maintain the action.

3. It being impossible to effect restitution *in integrum* between the Pursuer and the bank, the Pursuer cannot maintain this action.

4. The Pursuer is barred by acquiescence, and by his own actings as a partner of the company in respect of the shares in question, from insisting in the action.

5. The present position and circumstances of the company and partners thereof,

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differ so materially from their position and circumstances when the Pursuer became a partner of the bank in 1855, that he cannot maintain this action either to the effect of rescinding the transfers in his favour or for damages.

6. The Pursuer is liable to the creditors of the *Western Bank* for the debts due by the bank, and is not entitled to any relief that would tend to discharge him from that liability.

7. In any event, the Pursuer is bound to pay the calls in full, whatever may be his rights as against his co-contributories.

The First Division of the Court of Session, on the 2nd of February, 1864, found as follows:—

Find that the Pursuer has stated matter relevant to entitle him to go to trial.

On the 9th of February, 1864, the First Division approved of issues and ordered them to be tried "as regarded the conclusions *other than the conclusions for damages.*"

The issues were these:—

"Whether the Pursuer was induced to make the said purchase by false and fraudulent representations made by the said bank as to the state of its affairs; and whether the Defenders are resting-owing to the Pursuer the sums contained in the schedule hereunto annexed, or any part thereof?" or,

"Whether the Pursuer has barred himself from repudiating the said purchase?"

These issues were tried before a jury in January, 1855, and a verdict was returned for Mr. *Addie.*

A bill of exceptions, however, was tendered by the counsel for the bank to the ruling of the presiding Judge. But those exceptions were, on the 9th of June, 1865, overruled.

The appeal of the bank to the House of Lords was against the interlocutor of the 2nd of February, 1864, sustaining the relevancy; against the interlocutor of the 9th of February, 1864, approving of the issues, and ordering their trial; and against the interlocutor of the 9th of June, 1865, overruling the exceptions.

Mr. *Addie* presented to the House a cross appeal against the interlocutors of the 2nd and 9th of February, 1865, impeaching them partially on the ground that issues tendered by him had been rejected; that issues tendered by the bank had been adopted; and that the question of damages had been superseded.

The *Attorney-General* (1), Sir *Roundell Palmer*, Q.C., and Mr. *Shand*, were of counsel for the Appellants. They insisted that the

(1) Sir *John Rolt.*

alleged misrepresentation, if such it could be called, was not by the company,—the shareholders,—but by the manager without authority, through a local agent; and all that was said was, that the purchase of the shares would be "a good investment." The *dolus* is nowhere brought home to the shareholders. It is not imputed to the company, nor even charged distinctly against the directors. The demand, therefore, is unsustainable: *Burness* v. *Pennel* (1); *Barratt's Case* (2); *Holt's Case* (3); *Duranty's Case* (4). But even if the directors were to blame, they were not agents of the company to commit a fraud. The remarks of Lord *Cranworth* in *The New Brunswick Railway* v. *Conybeare* (5) are strong to this effect. But here the complainant is himself a partner, seeking redress against his brother shareholders after two years' acquiescence. When a contract is executory, and restoration is practicable, there may be an equity to have it set aside on the ground of fraud. But when the *jus tertii* intervenes, redress is excluded. Here the other innocent shareholders are entitled to consideration: *Stevenson* v. *Newnham* (6). A contract is not void, but optionally voidable, on the ground of fraud, things remaining entire, which in this case they are not. Other interests have attached, and rescission is excluded: *Clarke* v. *Dickson* (7). Here the delay is of itself conclusive: *Mixer's Case* (8), overruling *Brockwell's Case* (9). In *Davidson* v. *Tulloch* (10), the action was against the individuals charged with the fraud. The Scotch law is the same as the law of *England* as to void and voidable contracts. The reports of directors are matters *inter socios*: *Deposit Company* v. *Ayscough* (11). On the whole, we conceive that *Mixer's Case*,

(1) 6 Bell, App. Ca. 541.
(2) 3 D. J. & S. 30.
(3) 22 Beav. 48.
(4) 26 Beav. 273; 4 Jur. N.S. 1068.
(5) 9 H. L. C. 736; 8 Jur. N.S. 1570.
(6) 13 C. B. 302.
(7) E. B. & E. 148 (1858). In this case Lord *Campbell*, C. J., said, "The Plaintiff cannot rescind the contract and sue for money had and received. He must seek his remedy by special action for deceit; and recover, not the original price, but whatever is the real damage sustained."
(8) 4 De G. & J. 575; Lord *Campbell* in this case said, "*Mixer* must be considered to have become a shareholder in June, 1856. He acted on the contract. He executed the deed. He received dividends, and thus derived a benefit from his contract. Even after the bankruptcy, he did not say he would repudiate the contract."
(9) 4 Dru. 205; 3 Jur. N.S. 880.
(10) 3 Macq. 783.
(11) 6 E. & B. 761; 2 Jur. N.S. 872.

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already referred to, governs the decision of this appeal, and is irresistible.

The *Dean of Faculty*, Mr. *G. M. Giffard*, Q.C., and Mr. *Balfour*, for the Respondent, urged that the chief object of this suit (which is addressed to the Court in its equitable character) is *restitutio in integrum*, in other words, a complete restoration to the party defrauded, without reference to the perpetrators of the fraud, who have gained by it, and, consequently, are not objects of judicial protection. *Voet* (1) tells us that the prætor grants this remedy "to circumvented individuals, restoring them to their pristine state." *Brissonius* (2) agrees with *Voet*. He says not a word of restitution to any but the victims; with this reasonable qualification, that he who seeks *restitutio in integrum* must not himself retain an advantage. Thus *Pothier* (3) intimates that, "if the thing bargained for has ceased to exist, as if the horse which I have purchased has died of the malady in respect of which I sue the seller, it will be sufficient for me to give back what remains of the animal, as the skin, if it is demanded. But I am to be recouped in all respects." The law of *Scotland*, and, we think, the law of *England*, agree here with the Roman and the French law. By all these systems, a contract procured by fraud is absolutely void, and not merely voidable. Especially is this the case in *Scotland*. No Scotch decision, no Scotch writer of authority, countenances the opposite doctrine; which seems, indeed, to be of but recent recognition in *England*. The question of relevancy is the cardinal one in this case. There are no creditors in the field. The contest is with the other shareholders. But are they entitled to retain that which has come to them by fraud? The negative of such a proposition has the sanction of this House, as appears by the remark of Lord *Westbury* in *The New Brunswick Company* v. *Conybeare* (4), decided after *Mixer's Case*, on which the Appellants so much rely. To the same effect is the prior case of *The National Exchange Company* v. *Drew* (5). The English cases, which involve contests with creditors, go beyond our contention. The only question is: "Shall the company be allowed to retain this money?"

(1) B. 4, tit. 1.
(2) Voce *Restituere*.
(3) *De Vente*.
(4) 9 H. L. C. 711, John 25575.
(5) 2 Macq. 103.

At the close of the argument on the 12th of March, the Lords intimated that, as the decisions conflicted, they would take time to consider the case, with a view to the laying down of some general rules.

On the 20th of May, the following opinions were delivered:—

THE LORD CHANCELLOR (1):—

My Lords, this is an appeal against interlocutors of the First Division of the Court of Session in an action instituted by the Respondent against the *Western Bank of Scotland* and the official liquidators appointed to wind up the affairs of the bank.

The summons in the action demands a reduction and restitution *in integrum* against two deeds of transference of 135 shares in the bank, and the repayment of the sum of £10,313 10*s.* 2*d.*, being the price of the said shares, and also of the sums of £1685, £1685, and £13,500, being the amounts respectively of three calls made upon such shares, and alternatively it demands damages in respect of the transaction.

The following are the facts stated by the Pursuer in his condescendence, and admitted by him in answers to the Defender's statement. The Defenders are a joint stock banking company, established in 1832, which carried on its business at *Glasgow* and elsewhere down to November, 1857, when it stopped payment. The paid-up capital amounted to £1,500,000, divided into 30,000 shares of £50 each.

By the deed of co-partnership, the business and affairs of the company were to be regulated, conducted, and carried on by a governor and deputy governor, six extraordinary and six ordinary directors, who were constituted the representatives of the company, and to whom the whole management of its business and affairs was intrusted; and the ordinary directors, together with the manager, or, failing him, or in his absence, the cashier of the company, were to constitute the ordinary board of directors and committee of management of the company. And by one of the articles of the deed it is declared that it shall be lawful for the directors to purchase, for behoof of the company, any of the shares of the capital

(1) Lord *Chelmsford.*

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stock which may either be offered for sale by private bargain, or shall come to be publicly sold.

Prior to the year 1855, the Pursuer was the proprietor of fifteen shares in the bank, and interested to the extent of one-half in thirty shares belonging to a dissolved firm of *Addie & Co.* He was also a customer, and kept his private account with a branch of the bank at *Coatbridge.*

In November, 1855, the directors sold to the Pursuer 135 shares belonging to the bank, at the price of £76 per share, amounting in all to the sum of £10,200, which were transferred by two separate deeds of transference, dated respectively the 30th of November and the 4th of December, 1855. The transaction of the sale of these shares was conducted through Mr. *John Taylor*, the manager of the bank.

In the June of each year meetings were held, when the directors submitted to the shareholders reports as to the state of the affairs of the bank for the year ending in the previous month of May. By the terms of the co-partnership deed no partners, except the ordinary board of directors, were entitled to examine the books of the company. The reports submitted by the directors to the different meetings of the shareholders held from the years 1851 to 1855, both inclusive, represented the business of the bank as highly prosperous, and that its affairs were in a satisfactory and flourishing condition. In particular, the report for the year 1855 stated that for the year ending May, 1855, the business of the bank had been eminently successful, and that its affairs were in a sound and satisfactory condition; that, after providing for bad and doubtful debts, the profits for the year available for dividend were upwards of £153,000.

These reports were untrue. Not long after its institution, the bank sustained heavy losses through bad debts, and, in 1851, had lost half its capital. In May and June, 1855, the bad debts had reached the amount of £1,360,000; and the bank had at that time lost £1,000,000 of its capital, or more than one-half thereof. The result brought out in the report for the year 1855 was obtained by taking as good assets of the bank the whole of the bad and irrecoverable debts. The reports were prepared by *Taylor*, the manager, and, as the Pursuer alleges in his condescendence, were

submitted to the shareholders for the fraudulent purpose of concealing from them the actual condition of the bank, and inducing a belief that it was in a sound and prosperous state, and of keeping up the price of the shares, and inducing the shareholders and others to purchase the shares belonging to the bank.

The Pursuer further alleges in his condescendence that in November, 1855, *Taylor*, for the fraudulent purpose of effecting a sale of part of the shares belonging to the bank, caused *Thomas Torrance*, the agent for the bank at *Coatbridge*, falsely to represent to the Pursuer that a purchase of shares in the bank would be a good investment, *Taylor* well knowing that it would not; that the Pursuer had no means of knowing the true state of the bank, except from the information communicated to the shareholders at the annual meetings by the reports of the directors and by the declarations and payments of dividends; that, relying on the truth of these reports, and in particular on the report of 1855, and on the fraudulent representations made to him by *Taylor* through *Torrance*, the Pursuer purchased and paid for the 135 shares, and accepted transferences thereof, and that, instead of the shares being worth £76 per share, they were worthless, or at least of inconsiderable value.

Subsequently to his purchase of the shares, the Pursuer received the following dividends upon them: £270 on the 27th of December, 1855; £283 10*s.* on the 12th of July, 1856; £283 10*s.* on the 24th of December, 1856; and £294 17*s.* 9*d.* on the 10th of July, 1857, amounting in the whole to £1131 17*s.* 9*d.*

During the period of the bank's carrying on business it was an unincorporated company, but having stopped payment on the 9th of November, 1857, it was resolved by the shareholders to wind up voluntarily under the *Joint Stock Companies Act*, 1856, and, on the 8th of December, 1857, the company was registered and incorporated under the *Joint Stock Companies Act*, 1856, as amended by the *Joint Stock Companies Act* of 1857. In the course of the liquidation, in which the Pursuer took part as one of a committee to assist the liquidators, it was found that losses to the extent of £3,000,000 had been incurred, and in consequence two calls were made upon the shareholders, which the Pursuer paid, to the amount of £16,875, under protest.

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Upon this state of facts, the Pursuer, by two of his pleas in law, alleged that he was entitled to the decree of reduction and payment as concluded for:—1. In respect that the directors and manager of the bank made false representations to him as to the condition of the bank, and that he was thereby induced to buy the shares in question. 2. That essential error was produced by the misrepresentation of the bank.

The Defenders, by their pleas in law, alleged that the Pursuer's averments were not relevant or sufficient in law; that the statements and representations of the directors or agents of the company were unauthorized by the company; that the Pursuer being a shareholder, the representations complained of were made by the directors on behalf of himself and the other shareholders; that restitution *in integrum* being impossible, the Pursuer could not maintain the action; and that he was bound by acquiescence.

The record having been closed, and the Defenders having been heard before the Lord Ordinary, on their objections to the relevancy, his Lordship appointed the Pursuer to give in issues. Issues having been lodged, the Lord Ordinary reported the cause to the First Division of the Court of Session. After hearing counsel, their Lordships pronounced an interlocutor appointing the parties mutually to lodge cases on the whole questions of law and relevancy involved. Cases for both parties were accordingly lodged; and the Pursuer having proposed certain issues, and the Defenders a counter-issue, the Lords pronounced an interlocutor that the Pursuer had stated on record matter relevant to entitle him to go to trial; and that as the Pursuer insisted in the conclusions for reduction, and for restitution or repetition, the case, as regarded those preliminary conclusions, should be tried and disposed of, and that the issue proposed by the Pursuer was the appropriate and suitable issue.

Against this interlocutor the Defenders have appealed; and the first question which your Lordships have to consider is, whether the case stated by the Pursuer is a relevant case or not.

In determining the relevancy of a Pursuer's case, the Court must look not only to the cause of action stated in his condescendence, but also to any admissions made by him upon the Defenders' state-

ment of facts, which are thereby adopted by him, and become part of his own case.

Upon the statements and admissions of the Pursuer two questions arose:—1st. Whether he was entitled originally to rescind the contract for the purchase of the shares in question; and, 2ndly. Whether he was debarred of his right by the change which had taken place in the condition of the company at the time when his action was brought.

Upon the first question, the Court had to determine how far a company is bound by the misrepresentations of its managing body, upon which there are numerous irreconcilable decisions.

In *Dodgson's Case* (1), Vice-Chancellor *Knight Bruce* held that "directors cannot be the agents of the body of shareholders to commit a fraud; and that the directors only were liable for their conduct." This opinion was adopted by Vice-Chancellor *Parker* in *Bernard's Case* (2), where he said: "*Dodgson's Case* shews that the directors cannot be the agents of the company to commit a fraud; and, therefore, even if Mr. *Bernard* had been induced to take shares by the misrepresentation of the directors, that was no reason why he should not be a contributory." But in *Brockwell's Case* (3), where the directors of the *Royal British Bank*, in their published reports, misrepresented the state of the company, and *Brockwell*, relying upon the truth of the reports, purchased some new shares which were issued by the company, upon which it was sought to make him a contributory, Vice-Chancellor *Kindersley* held (principally upon the authority of the case of the *National Exchange Company* v. *Drew*, decided in this House (4)) that reports made by directors to a company, if they get into circulation, must be considered as reports of the company; and *Brockwell* was removed from the list of contributories. The words "if they get into circulation" must mean, "if they are designedly published," for the Vice-Chancellor could never have intended to hold that if reports addressed to the shareholders, and to them alone, get into the hands of third persons by private and unauthorized circulation, they must be taken to be reports for which the company are responsible.

(1) 3 De G. & Sm. 85.
(2) 5 Ibid. 289.
(3) 4 Dru. 205.
(4) 2 Macq. 103.

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This case of *Brockwell* was overruled by Lord Chancellor *Campbell* and the Lords Justices in *Mixer's Case* (1), which was also a case connected with the *British Bank*. The Lord Chancellor, in his judgment, said: "Clearly there was fraud, and gross fraud, on the part of the directors, and I have no doubt that *Mixer* was induced by fraud to take his shares. I think, however, that it was a fraud on the part of the directors which cannot be attributed to the company;" and the Appellant was continued upon the list of contributories.

In that case the true reason was given why, even if the purchase of shares was induced by the fraud of the company, the person defrauded could not resist his liability to contribute as a shareholder. "It is a settled rule," the Lord Chancellor said, "that a contract obtained by fraud is not void, but that the party defrauded has a right to avoid it if he does so while matters remain in their former position."

In the case of the *National Exchange Company of Glasgow* v. *Drew*, opinions were expressed as to the responsibility of a company for the fraudulent misrepresentations of its directors, which are entitled to the highest consideration. My noble and learned friend, Lord *Cranworth*, said: "What is the consequence of the company receiving a report, and publishing it to the world? I confess that, in my opinion, from the nature of things, and from the exigencies of society, that must be taken, as between the company and third persons, to be a representation by the company. The company, as an abstract being, can represent or do nothing. It can only act by its managers. When, therefore, the directors, in the discharge of their duty, fraudulently, for the purpose of misleading others as to the state of the concerns of the company, represent the company to be in a different state from that in which they know it to be, and when the persons to whom the representation is addressed act upon it in the belief that it is true, I cannot think that society can go on without treating that as a misrepresentation by the company." And Lord *St. Leonards* said: "I have certainly come to this conclusion, that if representations are made by a company, fraudulently, for the purpose of enhancing the value of their stock, and they induce a third person to purchase stock, those representations

(1) 4 De G. & J. 575 (16 July, 1859).

so made by them for that purpose do bind the company. I consider representations by the directors of a company as representations by the company, although they may be representations made to the company, it is their own representation."

These opinions received the sanction of Lord Chancellor *Westbury*, in the case of the *New Brunswick and Canada Railway Company* v. *Conybeare* (1), where he said, "I certainly am not at all disposed to advise your Lordships to throw any doubt upon this doctrine, that if reports are made to the shareholders of a company by their directors, and the reports are adopted by the shareholders at one of the appointed meetings of the company, and these reports are afterwards industriously circulated, misrepresentations must undoubtedly be taken, after their adoption, to be representations and statements made with the authority of the company, and therefore binding upon the company."

My noble and learned friend, Lord *Cranworth*, in this last case, adhering to the opinion which he had expressed in the cases of *Ranger* v. *The Great Western Railway Company* (2) and the *National Exchange Company* v. *Drew*, suggested a distinction as to the effect upon the company of misrepresentations by the directors, which seems to me to explain the expressions of "misrepresentations of directors being misrepresentations of a company," and "misrepresentations of directors being binding upon a company," and to place the question upon its true ground. My noble and learned friend said, "The principle" (of making a company responsible for the misrepresentations of the directors), "cannot be carried to the wild length that I have heard suggested, namely, that you can bring an action against the company upon the ground of deceit because the directors have done an act which might render them liable to such an action. That I take not to be the law of the land, nor do I believe that it would be the law of the land if the directors were the agents of some person not a company. The fraud must be a fraud that is either personal on the part of the individual making it, or some fraud which another person has impliedly authorized him to be guilty of." (2)

The distinction to be drawn from the authorities, and which is sanctioned by sound principle, appears to be this: Where a person

(1) 9 H. L. C. 725; 6 Jur. N.S. 576

(2) 8 Jur. N.S. 579

(3) 5 H.L.Ca. 73. 867. 28 Jur. 795.

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has been drawn into a contract to purchase shares belonging to a company by fraudulent misrepresentations of the directors, and the directors, in the name of the company, seek to enforce that contract, or the person who has been deceived institutes a suit against the company to rescind the contract on the ground of fraud, the misrepresentations are imputable to the company, and the purchaser cannot be held to his contract, because a company cannot retain any benefit which they have obtained through the fraud of their agents. But if the person who has been induced to purchase shares by the fraud of the directors, instead of seeking to set aside the contract, prefers to bring an action for damages for the deceit, such an action cannot be maintained against the company, but only against the directors personally.

The action of Mr. *Addie* is for the reduction of the deeds of transference of the shares, and alternatively for damages. But as it is brought against the company, it will follow, from what has been said, that he cannot recover unless he is entitled to rescind the contract. The question then arises,—Does he shew upon the statement of his case that the false reports of the directors, and particularly the report of 1855, were the proximate and immediate cause of the purchase of the shares by the Pursuer? I do not think that it is necessary that they should be the sole cause; for, to repeat what I said in *Nicol's Case* (1), "Supposing that the reports of the directors formed a material part of the inducement to take the shares, without which the purchase would never have been made, I cannot think that the effect of them is destroyed because other influences were at the same time at work which contributed to the success of these false representations." But, where fraudulent reports are made the ground for rescinding a contract for the purchase of shares, the fraud is not to be established by impressions received from these reports at some former period, however distant; but they should be clearly shewn to be in the mind of the person at the time of the negotiations for the purchase, and to have been one of the causes leading to the contract. Apart from these reports there is no statement of any representations made to the Pursuer by the directors, or by their authority. That the directors knew of *Taylor's* endeavours to in-

(1) 3 De G. & J. 420.

duce the Pursuer to take shares in the bank is nowhere alleged. Although merely agents of the company themselves, and therefore, according to the well-known rule, they could not depute any other person to act for them, yet if they had employed *Taylor* to make false representations of the stability of the bank to the Pursuer, it would, in my opinion, have been of the same effect as if they had been made by themselves. But not only is there no statement in the case of any such delegation of authority to *Taylor*, but it is not even shewn upon the record that *Taylor* had any personal communication with the Pursuer. *Taylor* (it is stated) employed *Torrance*, the agent of the bank at *Coatbridge*, where the Pursuer kept his account, to endeavour to get him to take shares. But it is not alleged that *Taylor* instructed *Torrance* to speak of the prosperity of the bank, and to tell the Pursuer that he considered it to be a good investment for his money, nor that *Torrance* did not at the time believe in the stability of the bank.

Therefore, though this was a case in which, as the Pursuer was seeking to rescind a contract from which the company had derived benefit, his action was maintainable; yet I entertain considerable doubt whether in his statement he connected the directors sufficiently with the alleged misrepresentations to make them imputable to the company, and whether he did not fail to state a relevant case upon the record on this ground.

But on the question, whether the Pursuer was not deprived of his right to rescind the contract by the change in the character and condition of the company, which appears from his condescendence and admissions, I have no doubt that the relevancy of his case altogether failed.

Whether the change of the company from an unincorporated to an incorporated banking company, for the purpose of more conveniently winding up its affairs under the *Joint Stock Companies Act*, 1856, so changed the nature and character of the shares purchased by the Pursuer as to render a *restitutio in integrum* impracticable, is a question which, if it were necessary to determine, I should wish to consider more carefully.

It was undoubtedly one of the grounds upon which the case of *Clarke* v. *Dickson* was decided. In that case a mining company was, with the Plaintiff's assent, registered as a company with limited

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liability, and was wound up under the *Winding-up Act*. In an action for money had and received to recover back the amount paid for the purchase of the shares, the Court held that the action was not maintainable. Mr. Justice *Erle* said: "He has changed the nature of the article; the shares he received were shares in a company on the cost-book principle, the Plaintiff offers to restore them after he has converted them into shares in a joint stock corporation;" and in this opinion Mr. Justice *Crompton* agreed.

*Mixer's Case*, to which I have referred, was a case between an alleged shareholder and the creditors of the company; and it may be thought that different considerations will apply where the question arises between a company and the person who has been fraudulently induced to become a shareholder; but the case of *Clarke* v. *Dickson* shews that there is no distinction between the cases. There the action was against three directors of a company, to recover back money paid by the Plaintiff for shares which he was induced to purchase by the false and fraudulent representation of the Defendants. In that case the company was being wound up under the *Winding-up Act*, and it was during the process of winding-up that (as in this case) the Plaintiff for the first time discovered that the representations by which he was led to make the purchase were false. The Court held that the Plaintiff was not entitled to recover. Mr. Justice *Crompton*, after adverting to the rule of law, "that a contract induced by fraud is not void, but voidable at the option of the party defrauded, said: "It seems to me to follow that when that party exercises his option to rescind the contract he must be in a state to rescind; that is, he must be in such a situation as to be able to put the parties into their original state before the contract."

It may seem to be a hardship on the Pursuer that he should be compelled to keep the shares because, in ignorance of the fraud practised upon him, he retained them until an event occurred which changed their nature and prevented his returning the very thing which he received. But he is not without remedy. If he is fixed with the shares he may still have his action for damages against the directors, supposing he is able to establish that he was induced to enter into the contract by misrepresentations for which they are responsible. But in his present action the Pursuer could

not have recovered damages against the company; and therefore, both on the claim in his summons for restitution and repayment, and also for damages, the Pursuer stated no relevant case upon the record, and the first interlocutor, "finding that the Pursuer has stated on record matter relevant to entitle him to go to trial," ought not to have been made, and no issues ought to have been directed. All which followed upon this interlocutor must of course fall with it; but as various questions were raised and argued at the bar upon the subsequent proceedings, it may be right to notice them.

The issues approved by the Court were afterwards tried by the Lord President and a jury, and a verdict was found for the Pursuer. A bill of exceptions was tendered to his Lordship's summing-up, both on the ground of misdirection and nondirection. A rule was afterwards granted to set aside the verdict as contrary to evidence and for a new trial. This rule, and the bill of exceptions, came on for argument at the same time, when the Court of the First Division pronounced two interlocutors of the same date, one of them disallowing the exceptions, which is appealed from, and the other setting aside the verdict and granting a new trial.

The issues were:—1. Whether the Pursuer was induced to make the purchase by false and fraudulent representations made by the bank as to the state of its affairs; and whether the Defenders are resting-owing to the Pursuer the sums contained in the schedule hereunto annexed, or any part thereof? or, 2. Whether the Pursuer has barred himself from repudiating the said purchase?

In his charge to the jury the Lord President told them that if the case should occur of directors taking upon them to put forth in their report statements of importance in regard to the affairs of the bank false in themselves, and which they did not believe, or had no reasonable ground to believe, to be true, that would be a misrepresentation and deceit. The counsel for the Defenders excepted to this direction, so far as it related to the directors having no reasonable ground to believe the truth of the statements in the reports; and they also called upon the Lord President to direct the jury that, upon the evidence before them, the action was not maintainable in law, and that the Defenders were entitled to a verdict upon the first issue, and that, upon the evidence, the Pursuer had in law barred himself from repudiating the purchase,

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and the Defenders were entitled to a verdict on the second issue. The Lord President declined to give these directions, and the bill of exceptions was tendered. The interlocutor, as already mentioned, disallowed all these exceptions.

I agree in the propriety of this interlocutor, so far as it relates to the exception on the ground of misdirection. In the argument upon this exception the case was put of an honest belief being entertained by the directors, of the reasonableness of which it was said the jury upon this direction would have to judge. But supposing a person makes an untrue statement, which he asserts to be the result of a *bonâ fide* belief of its truth, how can the *bona fides* be tested except by considering the grounds of such belief? And if an untrue statement is made founded upon a belief which is destitute of all reasonable grounds, or which the least inquiry would immediately correct, I do not see that it is not fairly and correctly characterized as misrepresentation and deceit.

The other exception—upon the refusal of the Lord President to direct the jury to find for the Defenders on both the issues—may be disposed of by reference to what I have already said upon the appeal against the first interlocutor on the subject of relevancy. I expressed a doubt whether, upon the record, there were proper allegations to connect the directors with the representations which induced the Pursuer to purchase the shares. At the trial the evidence upon this point was equally deficient. *Taylor* was not called, and no authority was shewn to have been given to him by the directors for the employment of *Torrance* to persuade the Pursuer to purchase shares. The Pursuer himself did not prove that he had any communication with *Taylor*. But as he swore that he "purchased on the faith of the reports and what *Torrance* told him," I do not think that the Lord President could have withdrawn the case from the jury upon this first issue; because if the reports formed a material part of the inducement to the purchase, then whether *Torrance's* representations were brought home to the directors or not, there were sufficient misrepresentations proceeding directly from themselves which were proper for the consideration of the jury.

But it will be collected from what I have already said, that the exception on the ground of the Lord President having refused to

direct the jury that the Pursuer had in law barred himself from repudiating his purchase was a good exception. The exception is not, perhaps, worded with exact precision, but I think it is sufficiently so to have required the Judge to give the proper direction to the jury. The Defenders evidently pointed to some act of the Pursuer by which he had barred himself from rescinding the purchase of the shares; referring probably to his receipt of dividends, and to the part he took in assisting the liquidators in the winding-up.

As this exception ought to have prevailed, the interlocutor disallowing all the exceptions cannot be maintained.

There are one or two other points which were raised in the course of the argument which deserve a short notice. It was said, if the fraud is imputable to the company from the representations of the directors, as the Pursuer was a shareholder at the time the representations are his own, as one of the company to himself through his agent. I think the fallacy of the argument lies in this:—In a suit instituted against a company to rescind a contract to purchase shares which the purchaser was induced to enter into by the misrepresentations of directors, the misrepresentations are not regarded as actually made by the company, but they are not permitted to retain the benefit of a contract which has been fraudulently obtained for them by their agent. And although, according to the strict rules of the common law, a man cannot be Plaintiff and Defendant at the same time, yet in a Court of equity (and equity as well as law is administered in the Scotch Courts) it could not, in my opinion, be a valid objection to a suit to set aside a contract for fraud, that the complainant was a member of the company, by the fraud of whose agents, technically imputed to the company, he was drawn into the contract.

Another objection which was urged against the right of the Pursuer to be relieved from his contract was, that it would prejudice the interests of other innocent shareholders who had acquired shares after the Pursuer became possessed of those in question. In answer to this argument I would only observe that these subsequent shareholders either bought their shares under circumstances which compel them to hold them, or they also were induced to join the company by false representations. If they are

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bound to continue to be shareholders, I do not see upon what principle they can contend, that their purchase of shares prevents the contract of the Pursuer being impeached for fraud; and if they, like the Pursuer, have been deceived into the purchase of their shares, and abstain from taking proceedings to exonerate themselves from liability, there is no reason why their forbearance should hinder the Pursuer from taking steps to rid himself of a contract into which he has been drawn by a similar fraud.

It only remains to observe, that although the interlocutors directing the issues ought to be reversed on the ground that the Defenders were entitled to judgment on the question of relevancy, yet upon the Pursuer's cross appeal it appears to me that upon the record there ought to have been no issue with respect to his claim to damages. His action being against the company for the fraud of the directors, the Pursuer could only recover in such action if he were entitled to rescind the contract. If his claim rested in damages, he ought to have proceeded against the directors, who would alone have been liable to him in that form of action.

Upon a review of the whole case, I must advise your Lordships that all the interlocutors appealed from ought to be reversed (1).

LORD CRANWORTH:—

5 Eq 255
5 Ch D. 449

My Lords. The Respondent, who was Pursuer in this action, sought relief on one of two grounds. First, he claimed the right of repudiating altogether the contract for the purchase of the 135 shares, on the ground that he was induced to enter into that contract by the fraud of the directors, which he alleged ought to be treated as the fraud of the company; or, secondly, if from lapse of time, or from the mode in which he had, after the purchase, dealt with the shares, he is precluded from that relief, then he claimed to recover from the Appellants compensation to the full extent to which he had been damaged by having been fraudulently led to enter into the contract. The extent of relief would, in fact, be the same, on whichever ground it might be made to rest.

Relief under the first head, which is what in *Scotland* is designated *restitutio in integrum*, can only be had where the party

(1) See Lord *Colonsay's* remarks, *infra* p. 169, as to the effect of the reversal on the state of the cause.

seeking it is able to put those against whom it is asked in the same situation in which they stood when the contract was entered into. Indeed, this is necessarily to be inferred from the very expression, *restitutio in integrum;* and the same doctrine is well understood and constantly acted on in *England.*

The question, therefore, on this head of relief is, whether, assuming the existence of the fraud alleged by the Respondent, and that it was a fraud which he was warranted in imputing to the company for whom the directors were acting, the facts alleged are such as entitle him to relief by way of *restitutio in integrum;* whether a relevant case is stated warranting that relief. The learned Judges below were of opinion that they ought not to pronounce any judgment on this point until the facts had been investigated by a jury trial; and they accordingly framed issues for that purpose. But, with all deference to them, I think no such trial was necessary, because, on the facts stated and admitted on the record, no relevant case is stated entitling the Pursuer to relief against the Appellants.

The company, by whose directors the fraud is alleged to have been committed, was an unincorporated banking company, carrying on business under the provisions of 7 Geo. 4, c. 67, with a capital of £1,500,000, divided into 30,000 shares of £50 each. Assuming that this company, by its directors, fraudulently induced the Respondent to purchase 135 of these shares, so as to entitle him to relief against the company, he cannot insist on *restitutio in integrum* unless he is in a condition to restore the shares which he so purchased. But this is impossible. The purchase was made by him in 1855, and in 1857 he was party to a proceeding whereby the company from which the purchase was made was put an end to. It ceased to be an unincorporated and became an incorporated company, with many statutable incidents connected with it which did not exist before the incorporation. This new company is now in course of being wound up; but even if that were not so, if it still were carrying on the business of bankers, *restitutio in integrum* would have been impossible. The Respondent might in that case have given up 135 shares of the new company, and these shares might have been as valuable as, or even more valuable than, the shares which he was induced to purchase, but they would not

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have been shares in the same company; and unless he was in a position to restore the very thing which he was fraudulently induced to purchase, he cannot have relief by way of *restitutio in integrum*. The time had gone by during which the Respondent could repudiate the contract. The circumstances were so changed that he could not put the Appellants in the condition in which they were before the fraudulent sale to him. I agree with the learned Judges below, that the circumstance that the shares, from mismanagement or otherwise, had become depreciated in value subsequently to the purchase by the Pursuer, would of itself have been of no importance. He might still have been able to restore that which he was fraudulently induced to purchase. But what in fact took place was not a depreciation but a destruction of the thing purchased; the unincorporated company in which he had been induced to purchase shares no longer existed. The view which I thus take of this case makes it unnecessary to consider whether there are not other grounds excluding this particular relief.

But although the Respondent is excluded from redress in this form, it remains to consider whether he may not recover compensation in damages, and so obtain relief as beneficial as that from which he is thus barred. But here, too, I am of opinion that the Respondent must fail. He comes too late. The Appellants are not the persons who were guilty of the fraud; and though the incorporated company is, by the express provisions of the statute under which it was incorporated, made liable for the debts and obligations incurred before the incorporation, I cannot read the statute as transferring to the incorporated company a liability to be sued for frauds or other wrongful acts committed by directors before the incorporation. An incorporated company cannot, in its corporate character, be called on to answer in an action for deceit. But if, by the fraud of its agents, third persons have been defrauded, the corporation may be made responsible to the extent to which its funds have profited by those frauds.

If it is supposed that in what I said when the case of *Ranger* v. *Great Western Railway Company* was decided in this House, I meant to give it as my opinion that the company could in that case have been made to answer as for a tort in an action for deceit,

(1) 5 H. L. Ca. 73, 86; 18 Jur. 795

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I can only say I had no such meaning. In that case I came to the conclusion, without hesitation, that no fraud had been committed; and therefore the question of the liability of the company, on account of the suggested fraud, did not arise. The allegation of *Ranger* was, that by the fraud of Mr. *Brunel*, the company's engineer, he had been induced to contract to do, and had done, works for them at a price grossly below their real cost, say for £20,000 instead of £40,000. The company got the full benefit of what he had so done; and in what I said, I merely wished to guard against its being supposed that I assented to the argument that there would be no means of reaching the company if the fact of the fraud had been established. By what particular proceeding relief could have been obtained is a matter on which I did not intend to express, and, indeed, had not formed any opinion. It was unnecessary that I should do so.

An attentive consideration of the cases has convinced me that the true principle is, that these corporate bodies, through whose agents so large a portion of the business of the country is now carried on, may be made responsible for the frauds of those agents to the extent to which the companies have profited from these frauds; but that they cannot be sued as wrong-doers, by imputing to them the misconduct of those whom they have employed. A person defrauded by directors, if the subsequent acts and dealings of the parties have been such as to leave him no remedy but an action for the fraud, must seek his remedy against the directors personally.

It is not out of place here to point out that the principles insisted on for the Respondent would, if adopted by your Lordships, lead to great injustice. Here the fraud is alleged to have been committed, not by the incorporated company now in process of being wound up, but by the persons who were trading in November, 1855, as an unincorporated company under the *Banking Act*, 7 Geo. 4, c. 67. It is true that many, I suppose most, of the persons who were responsible, so far as they were responsible, for the acts of the directors in 1855, became members of the new incorporated company; but they did not thereby transfer to the new company the liability to be sued in consequence of frauds previously committed by the agents of the unincorporated com-

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pany; still less could they make other persons, who were not members of the unincorporated partnership when the fraud was committed, liable to be sued because they joined with them in procuring an incorporation under the statute.

On these short grounds I have come to the conclusion, that no relevant case is stated on this record entitling the Respondent to relief against the Appellants, either by way of *restitutio in integrum*, or by way of damages. The consequence is, that no issues ought to have been directed; and, therefore, the interlocutors of the 2nd of February, 1864, and the 9th of February, 1864, must be reversed.

This being so, the trial and all connected with it necessarily falls to the ground. We are, however, bound to dispose of the interlocutor of the 9th of June, 1865, disallowing the exceptions to the ruling of the Lord President at the trial, and against which the Appellants have appealed. His Lordship told the jury, that if the directors put forth in their report important statements which they had no reasonable ground to believe to be true, that would be misrepresentation and deceit, and in the estimation of the law would amount to fraud. I confess that my opinion was, that in what his Lordship thus stated, he went beyond what principle warrants. If persons in the situation of directors of a bank make statements as to the condition of its affairs which they *bonâ fide* believe to be true, I cannot think they can be guilty of fraud, because other persons think, or the Court thinks, or your Lordships think, that there was no sufficient ground to warrant the opinion which they had formed. If a little more care and caution must have led the directors to a conclusion different from that which they put forth, this may afford strong evidence to shew that they did not really believe in the truth of what they stated, and so that they were guilty of fraud. But this would be the consequence, not of their having stated as true what they had not reasonable ground to believe to be true, but of their having stated as true what they did not believe to be true.

It is hardly necessary to advert to the cross appeal; but it is due to Mr. *Addie* to say, that if a relevant case had been stated on the record on both heads on which relief is asked, and it had been necessary to direct issues, I think he is right in his contention that

those issues ought to have been so framed as to exhaust the whole case, so as to make it impossible that it should be necessary at a future time to frame further issues, and incur the delay and expense of another trial.

LORD COLONSAY :—

Not having heard the whole of the argument for the Appellants, I take no part in pronouncing the judgment now proposed in so far as regards the substance of that judgment. But having been appealed to by my noble and learned friend as to the form in which effect should be given to the expressed intentions of the House, I take leave to suggest that, as the interlocutor of the 2nd of February, 1864, which found that the Pursuer had stated on record matter relevant to go to trial, is to be reversed, and as there is to be a declaration of this House to the effect that the averments of the Pursuer are not relevant or sufficient in law to support the conclusions of the action, and that the Defenders should be assoilzied, all the proceedings in the Court below on and after the 2nd of February, 1864, necessarily fall to the ground. This interlocutor of the 2nd of February, 1864, sustaining the relevancy of the Pursuer's averments formed the law of the case in the Court below, and was the basis of all that followed; and until that interlocutor was reversed (which could only be done by this House), the Judges in the Court below could not, either at the trial or in the subsequent proceedings, give any direction or decision not consistent with the interlocutor, sustaining the relevancy of the Pursuer's averments. But now that a judgment is to be pronounced against the relevancy of these averments, and assoilzieing the Defenders, that will have the effect of sweeping away not only the interlocutor of the 2nd of February, 1864, but likewise all that followed, however legitimately, upon that interlocutor. It may, however, be right in point of form, and will be safe, to embody in the judgment a declaration that "therefore" the interlocutors appealed from are reversed.

*Interlocutors reversed.*

Solicitors for the Appellants: *Loch & McLaurin.*
Solicitors for the Respondent: *Grahames & Wardlaw.*

1867
June 4.

THE WESTERN BANK OF SCOTLAND WITH ITS LIQUIDATORS . . . . . } APPELLANTS;

JAMES BAIRD AND THE TRUSTEES OF WILLIAM BAIRD, DECEASED . . . . . } RESPONDENTS.

*Competency of an Appeal—Interlocutory Order*—48 *Geo.* 3, *c.* 151.

When a judgment is interlocutory, when it is unanimous, when it relates to the practice of the Court below, and when leave to appeal is not granted, an appeal to the House is incompetent.

*Case of Account—Jury Trial.*

Where the result depends on voluminous and complicated commercial accounts, it may often be convenient and expedient to have a preliminary report from a professional accountant before sending the case to trial before a jury.

THE Appellants' action against *James Baird* was for £863,618 9*s.* 2*d.*, while their action (originally against *William Baird*, but now) against his trustees, was only for £299,736 7*s.* 6*d.*, making together upwards of a million sterling claimed for losses sustained by reason of alleged "gross neglect of duty" on the part of the *Bairds*, as directors of the *Western Bank of Scotland.*

The Lord Ordinary held the case relevant, and directed issues for trial by jury. But the Second Division of the Court of Session were of opinion that, inasmuch as the case did not appear to be one of the "enumerated cases" specially appropriated for jury trial by the 6 Geo. 4, c. 120, s. 28, they were at liberty, in the exercise of a judicial discretion, to order a preliminary examination of the books and accounts of the company, which were of course extremely complex and voluminous, and little fitted for the investigation of a jury. The Court, therefore, on the 10th of July, 1866, recalled the order for issues, and authorized an accountant to examine and report upon the whole case. Hence the present appeal, which the Respondents met by an objection, that the interlocutor making the remit to an accountant was merely interlocutory; that it was a unanimous judgment; and that leave to appeal was not given. The question came before the Appeal Committee, who reported

that the matter of competency should be argued along with the merits at the Bar of the House.

The case accordingly came on for argument in due course, when the *Attorney-General* (1), Sir *Roundell Palmer*, Q.C., Mr. *Brown*, Q.C., and Mr. *Shand*, appeared as counsel for the Appellants; Mr. *Selwyn*, Q.C., the *Dean of Faculty* (2), Mr. *Anderson*, Q.C., Mr. *Mellish*, Q.C., Mr. *Keane*, Q.C., and Mr. *Young*, for the Respondents.

The decision of the House went entirely on the question of competency, as will appear from the following opinions:—

THE LORD CHANCELLOR (3):—

Against this appeal a preliminary objection has been urged, which objection, it appears to me, ought to prevail.

By the 15th section of the 48 Geo. 3, c. 151, it is enacted that—

> Hereafter, no appeal to the House of Lords shall be allowed from interlocutory judgments, but such appeals shall be allowed only from judgments or decrees on the whole merits of the cause, except with the leave of the Division of the Judges pronouncing such interlocutory judgments, with a proviso, "that when a judgment or decree is appealed from, it shall be competent to either party to appeal to the House of Lords from all or any of the interlocutors that may have been pronounced in the cause, so that the whole, as far as it is necessary, may be brought under the review of the House of Lords."

The Appellants admitting that the judgment appealed from is interlocutory, and that it does not go to the full merits of the cause, contend that the Act does not apply, because they say that the action is founded on delinquency, or *quasi* delinquency, with a conclusion for damages only, and expenses; and that, therefore, being one of the enumerated cases in the 28th section of the 6 Geo. 4, c. 120, it ought to have been remitted *at once* for trial by jury.

But it is enacted by the 13 & 14 Vict. c. 36, s. 36, that—

> "In *all* causes appropriated for trial by jury, or in the course of preparation for trial by jury before the Court of Session, *the procedure*, both before and after the

(1) Sir *John Rolt*. (2) Mr. *Moncreiff*.
(3) Lord *Chelmsford*.

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closing of the record, shall be in all respects the same, as far as applicable, as in other Court of Session causes for the time being, except in so far as it may be otherwise provided by this Act, or by any act of sederunt to be passed by the said Court under the powers of this Act conferred."

Now, it is clear that in "other" causes, the Court might remit the matter to an accountant for necessary investigation; and, undoubtedly, this is *procedure*. As the 36th section applies to *all* causes, there can be no reason why it should not have been adopted on the present occasion.

But then it is said that in a case founded on delinquency, the Court has no power to remit to an accountant. On the part of the Respondent, it has been denied that this case is one of delinquency; but admitting it to be so, what is there to prevent that course being adopted? The Court below remitted to an accountant to examine the books and relative documents. Nothing was determined by this interlocutor; but a preliminary inquiry was directed, to enable the Court to determine the question of relevancy, and to frame proper issues with a view to the thorough determination of the cause.

Supposing, however, that the course taken by the Court was inadmissible, how can it be said to be an excess of jurisdiction? At the utmost it would only be an irregularity in the proceeding, and it would be strange that this House should be called upon by an interlocutory appeal to correct the practice of the Court of Session in the progress of a cause before them. It is not at all like the cases that have been mentioned in the argument, where, the *certiorari* having been taken away by Act of Parliament, an inferior Court, or a magistrate, has committed an excess of jurisdiction; and it has been held that the proceedings might be removed into the Queen's Bench and there quashed. That is a final proceeding, and to shut out inquiry would be a denial of justice.

I am of opinion that the appeal is incompetent, and that it ought to be dismissed, with costs.

LORD CRANWORTH concurred.

LORD COLONSAY:—

My Lords, this cannot be assimilated to the case of an inferior

Court, which, having exceeded its jurisdiction, calls for the correction of a superior tribunal. There can be no doubt that the Court of Session had jurisdiction to deal with this cause. But the argument is, that in a step of the procedure they have not followed the statutory regulation; or, in other words, the argument is, that in every case in which there can be found in a statute anything of a directory nature as to the course which is to be followed in the preparation of a cause, if the Court of Session commits an error in the application of that direction, then an appeal is competent, although the order of the Court may not deal with any part of the merits of the cause, or be the result of divided opinion; and, although there be no leave to appeal given by the Court below. There is no principle or precedent for this construction, which is contrary to the interpretation that has been put upon the Act (1) for nearly sixty years.

The provisions contained in the earlier statutes as to sending a case at once to the Jury Court were provisions to enable the Jury Court, not the Court of Session, to proceed with the preparation of the cause, as well as to try the cause. But those very statutes enacted that if questions arose, either of law or of relevancy, which the parties desired to be disposed of, the case was to be sent back to the Court of Session, in order that that Court might deal with those matters, and that when it had dealt with them it might send the case again for trial by a jury. But now there is no separate Jury Court. The preparation of a cause for trial remains throughout with the Court of Session; and it is not imperative on that Court to send a cause before a jury until they see whether or not there is a relevant and proper case for the purpose. Now, when I look at this record, I see that there may be great difficulty in regard to that matter. There may be difficulty in regard to the relevancy, and as to the sufficiency and perspicuity of the statements of the parties; so that there was good occasion, I think, for something to aid the Court in dealing with the case; and the reference to an accountant selected by themselves was, I think, a very prudent step to take. But that is not necessary to the decision of the point now before us, which really turns upon the

(1) 48 Geo. 3, c. 151.

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competency of this appeal; and I have no doubt that it is *incompetent.*

*Both appeals dismissed as incompetent, with costs.*

Solicitors for the Appellants: *Loch & McLaurin.*
Solicitor for the Respondents: *John Graham.*

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1867

*May* 6, 7.

THE LORD ADVOCATE . . . . . APPELLANT;
SINCLAIR OF FORSS . . . . . RESPONDENT.

*Salmon Fishings—Regalia—Prescriptive Possession under the Act* 1617, *c.* 12.

Salmon fishings are *inter regalia;* they belong to the class of regalia which the Crown may give away.

A grant of "fishings," merely, is not a grant of *salmon* fishings; but a grant of "fishings," merely, if followed by the requisite endurance of possession, will establish a right of *salmon* fishing, even against the Crown; for by the positive prescription of forty years under the Act 1617, c. 12, the rights of private parties are protected against all challenge, whether regal or popular.

A party claiming a right of salmon fishings must either shew a grant of salmon fishings, or a grant of fishings generally, followed, for the requisite period, by the exercise of the right of salmon fishing.

*Pertinents.*

Salmon fishings will not pass under the mere word "*pertinents.*"

*Tenendas Clause.*

Although this clause cannot transmit a right, it may aid in the construction of a clause which does transmit a right.

THIS action was commenced in 1846 by the then Lord Advocate (1) on behalf of the Crown and of the Commissioners of Woods, Forests, and Land Revenues, in order to have it found and declared that the salmon fishings in the bay of *Scrabster,* in the county of *Caithness,* belonged to the Crown, and that the Defender, the above Respondent, had no right to fish for salmon *ex adverso* of his estate, which formed part of the coast. The summons prayed an interdict.

In support of the regal claim the Lord Advocate relied on the

(1) The late Lord *Rutherford.*

following "pleas in law":—1. That Her Majesty was proprietor of all the salmon fishings around the coast of *Scotland*, and in the navigable bays and rivers thereof, so far as the same had not been expressly granted to any of her subjects by charter or otherwise. 2. That the salmon fishings in the bay of *Scrabster* were the Queen's, and not the Respondent's. 3. That the Respondent had no right to salmon fishings *ex adverso* of his lands, even although he could shew that his title deeds contained a clause "with fishings," inasmuch as neither he nor his predecessors possessed the *salmon* fishings under these title deeds for forty years, or even for any period prior to 1829.

The Respondent, on the other hand, insisted that his title to the estate of *Holburnhead*, part of the barony of *Scrabster*, with fishings, followed by a prescriptive enjoyment, constituted in him a legal and valid right to fish for salmon *ex adverso* of his lands. He further insisted that the fishings in question had been the subject of early regal grants, and had never been re-acquired by the Crown.

The Lord Ordinary, on the 21st of May, 1861, found that the Respondent had no right to the salmon fishings in question, and granted the interdict prayed. But on the 14th of June, 1865, the First Division altered the Lord Ordinary's interlocutor, and assoilzied the Respondent from the conclusions of the action with costs. Hence the present appeal.

The following counsel appeared for the Crown, namely, the *Attorney-General* (1), the *Lord Advocate* (2), the *Dean of Faculty* (3), Mr. *Anderson*, Q.C., and Mr. *T. Ivory*.

Sir *Roundell Palmer*, Q.C., and Mr. *Young*, for the Respondent.

The arguments, except in so far as they turned upon an examination of title deeds and evidence relating to the fishings in question, are, for the purposes of a report, sufficiently adverted to in the following opinions (4).

(1) Sir *John Rolt*.
(2) Mr. *Gordon*.
(3) Mr. *Moncreiff*.
(4) The case, moreover, is given at large in the 3rd Series of the Scotch Cases, vol. iii. p. 981.

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THE LORD CHANCELLOR (1):—

My Lords, in this contest with the Crown the onus of proof lies entirely upon the Respondent.

Now, according to the familiar law in *Scotland*, salmon fishings are *inter regalia*, and *primâ facie* Crown property; and a subject can only establish his right to them against the Crown by clear proof of title in himself. The Respondent has proved the exercise of the right of salmon fishing in the bay of *Scrabster*, and *ex adverso* of his lands of *Holburnhead*, for a period beyond the memory of man. But this of itself is insufficient, unless he can, in the words of the statute respecting prescription of heritable rights (2), "shew and produce a charter granted to him or his predecessors, by their superiors and authors, preceding the entry of the forty years' possession, with the instrument of sasine following thereupon."

The Lord Advocate contended that there is no authority for holding that the Crown can be divested of its right by a title from a subject followed by forty years' possession; but the statute is express, that after persons have possessed for forty years continually following and ensuing their infeftments, they shall "never be troubled, pursued, nor inquieted in the heritable right and property of their lands and heritages by His Majesty, or others their superiors and authors. And it is laid down by *Erskine* (3) that "a charter, though granted *à non domino*, is a good title of prescription, the length of time standing in the place of all other requisites." The words of the statute make this passage as applicable to the Crown as to a subject.

It is not necessary for the Respondent to shew a charter containing a grant of salmon fishing *eo nomine*.

If the grant is of "fishings" generally, followed by forty years' possession of salmon fishings, the word will be construed to have that meaning. But he must shew a grant either of "salmon fishing" or of "fishings" generally, followed by the exercise of the right of salmon fishing; for, being *inter regalia*, and a separate tenement, it will not pass under the mere word "pertinents."

(1) Lord *Chelmsford*. (2) 1617, c. 12.
(3) Institute B. 3, tit. 7, s. 4.

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I think that the prescriptive title of the Respondent cannot be drawn from a higher source than the disposition, in the year 1700, by *John Sinclair* of *Dunbeath*, in favour of *John Sinclair* of *Brims*. By that disposition, upon which sasine in 1703 proceeded, the lands of *Honbornehead*, *Outerquoy*, and *Sandequoy*, with anchorage of the road of *Scrabster*, were conveyed; and there is in the dispositive clause an express grant of fishings. It is not denied that the proprietors of these lands, the Respondent's predecessors, exercised the right of salmon fishing for forty years after this deed. Even if *John Sinclair* of *Dunbeath* had no title to salmon fishing *ex adverso* his lands at the time of this disposition, yet forty years' possession of salmon fishing afterwards by the disponee and his successors not only gave an interpretation to the word "fishings," but made the title unquestionable under the Prescription Statute of 1617.

The Respondent, therefore, is enabled to found his defence against the Crown upon this title, unless it was subsequently displaced.

In 1702, *John Sinclair* of *Brims* granted a wadset (1) of these lands and fishings to *James Sinclair*. The wadset continued to exist until the year 1761, when it was redeemed by *Sinclair* of *Forss*, who had in the previous year purchased the reversion; and all the conveyances, from 1700 to 1760, specified fishings in the dispositive clauses.

But then it is asserted, on the part of the Crown, that supposing a base title to have been thus established to the fishings under the wadset in 1761, the owner of the fishings under this title returned the subjects which he held, including the fishings, into the hands of the Crown, and received back a grant from which the fishings were excluded. The resignation here referred to undoubtedly took place; but we must bear in mind that the charter of 1761, which followed upon it, was a charter *in favorem*, the object of which was to convert the base title into a public title. The presumption therefore is, that whatever was resigned to the Crown for this purpose would have been re-granted. It is certainly true that in the dispositive clause of the charter there is no mention of fishings; but I see no reason on that account to adopt the strong

(1) A long lease by way of mortgage.

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LORD ADVOCATE v. SINCLAIR OF FORSS.

expressions of the Lord Advocate, that the Crown struck out the word "fishings," and refused to re-grant them. The fishings were either intended to be resigned into the hands of the Crown for the purpose of being re-granted, or they were not. If they were, why should not the same words by which they were resigned be sufficient for their re-grant? And if they were not included in the resignation, then the Respondent may fall back on his base title.

I quite agree that the *tenendas* clause will not have the effect of conveying any right not conveyed by the dispositive clause; but I do not see why, if a question arises as to what was re-granted upon the construction of the charter as a whole, any clause may not be resorted to in aid of construction, and the *tenendas* clause amongst the rest.

That rule is, that ancient instruments of every description may, in the event of their containing ambiguous language, be interpreted by what is called contemporaneous and continuous usage under them; that is, by evidence of the mode by which property dealt with by them has been held and enjoyed. Now from the time of the charter of 1761, when the vassal is supposed to have resigned the fishing and not to have obtained a re-grant of it, he continued to exercise his right of salmon fishing as before, and the same has been enjoyed by his successors down to the Respondent himself. On the whole, I think that the Respondent has successfully established his defence to the claim of the Crown, and I am of opinion that the judgment appealed from ought to be affirmed.

LORD CRANWORTH:—

It is clearly established in proof that the Respondent and his predecessors have enjoyed salmon fishings for a period greatly exceeding forty years before the present action was brought; in fact, as far back as living memory or tradition can go. This is sufficient to entitle him to salmon fishings if he has any *habile* title on which the enjoyment can rest, for the word "fishings" may be construed to mean salmon fishings, if, under a title to "fishings," salmon have always been taken.

The evidence of enjoyment must be taken as proving an exercise of the right of fishing for salmon as far back as the year 1700.

The grounds on which I have formed this opinion leave untouched the doctrine that the word "pertinents" does not *ex vi termini* include fishings, and also the rule of law, that subjects not included in the dispositive clause do not pass merely because they are mentioned in the *tenendas* clause. But there cannot be any principle which prevents us from discovering the true meaning of every part of an instrument by a fair examination of the whole.

My opinion is, that the Respondent has a good title under the Crown charters. But I also concur in the argument that even if that were not so, still he has a good title under the base holding created in 1700. If the resignation for new infeoffment in 1761 included the fishings, then, as I have already explained, the Crown must be taken to have re-granted them. If the resignation did not extend to the fishings, then *James Sinclair* of *Forss*, and those deriving title under him, have all along been holding by the base tenure created in 1700.

In any view of the case the claim of the Crown is unfounded.

LORD COLONSAY:—

My Lords, when this case was before the Court below, I fully stated my opinion in regard to it (1), and as the parties are in possession of those views, I do not think it necessary to enter much into the case now, as I have not heard anything that leads me to alter the opinion I then expressed. But there are some elementary matters, which have been dwelt on in the argument, to which I will shortly advert.

It is perfectly clear, as matter of law, that salmon fishings are *inter regalia*. It is also perfectly clear that they belong to that class of *regalia* which the Crown may give away. It is equally clear that a grant of "fishing" is not a grant of salmon fishing; and it is further clear that a grant of "fishing," if followed by the requisite possession, may be explained to constitute a grant of salmon fishing. By positive prescription the rights of private parties are protected against the challenge of the Crown.

Now, on the face of the documents and evidence here, I think

(1) See 2nd Series of the Court of Session Cases, vol. iii. p. 981, where the title deeds and other evidence relating to the estate in question and its fishings are traced out minutely.

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it is beyond the possibility of reasonable question that the Respondent and his predecessors have been in actual possession and enjoyment of these salmon fishings beyond the memory of man.

At a very early period, in 1606, the Crown had granted these salmon fishings to the family of *Caithness*, who granted a tack of them more than fifty years after the acquisition. At this distance of time, it is difficult to imagine a more clear evidence of possession than that afforded by the exercise of property which is involved in the granting of tacks. But that very tack to which I have referred was one of a series of tacks which were granted by the successive owners of these fishings. When we find that the Crown parted with the right at an early period, and when we find no evidence whatever of its having been re-assumed (unless in 1761), the theory that it is to be held as never having been relinquished is excluded from the case, and the main argument of the Crown is most materially shaken.

For a long period, from 1700 downwards, there has been a title on which a prescriptive right could have been sustained, and we have immemorial possession under that title.

The argument for the Crown consisted very much of criticisms on the rights of the Respondent; as if everything was to be presumed against him, and everything in favour of the Crown. Thus, with reference to the wadset, it was said that the reversion did not expressly mention "fishings." But the right of wadset gave the fishings. That right of wadset is, in the first place, a clear proof of the exercise of the right of property in the party who granted the wadset; and then, when the creditor who had obtained possession (which in this case was of the nature of what is called a proper wadset) renounced the right in respect of having obtained satisfaction of his debt from his debtor, and when the debtor came afterwards to redeem his right; the natural and reasonable construction of the grant of the reversion is, that it replaced the debtor in possession of all that which he had previously given to his creditor.

As to the charter of 1761, it is but a charter by progress, in which the grantee is completing, or making up his own title. It is not a resignation by him, for the purpose of making over his

right to the Crown, but it is a resignation by him with the view of getting from the Crown a new right in his own favour.

The question has been raised whether the word "pertinents" in that title can be held or construed to comprehend the salmon fishing. In ordinary cases it cannot. But the position of this title was peculiar. The description had been, in various steps of it, by reference to former titles; and when this party came to the Crown in order to get a renewal of his title, it was the duty of those who were acting for the Crown to look at the right that was in him at the time, and to see what was the character of it, and what it was that was to be renewed; and the reasonable presumption is, that whatever was then surrendered to the Crown for the purpose of being re-granted to the vassal *was* re-granted to the vassal. It has been said that there is no mention of fishings in the dispositive or conveying clause of this charter; that it occurs only in the *tenendas;* and we had the remark made (clearly sound in law) that the *tenendas* is not a conveying clause, and that it is generally not enough by itself. That certainly is a doctrine which hardly required much authority to support it;—but we were referred to the late Professor *Menzies*, whose lectures on conveyancing are of the highest value; and he lays down the doctrine as he found it in all the institutional writers. But it does not follow that the word "fishings" in the *tenendas* is immaterial where the fishings are not mentioned in various parts of the deed. On the contrary, in that very dissertation of Professor *Menzies* he affirms that, although the "*tenendas* cannot transmit a right, it may, in some cases, raise a presumption in favour of the grantee, so as to entitle him to establish a right by evidence of possession." Now that is the very position of the Respondent in the present case. The transaction of 1761 replaced the vassal in the right which he previously had in these fishings. But if it were otherwise, it cannot be set aside by attributing an inconsistent construction to the surrender of the vassal,—by holding that those expressions which cover his surrender are not equally competent to cover his replacement. If there was no replacement, it is clear that there was no surrender. At all events, the Respondent had the option, and he has now the right, of ascribing his possession to that title which he regards as most secure;—and, therefore,

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whether it is insisted that the right was then surrendered, or not, in either view the vassal has defended them successfully against this challenge of the Crown.

*Interlocutors appealed from affirmed; and appeal dismissed with costs.*

Solicitor for the Appellant: *Horace Watson.*
Solicitors for the Respondent: *Grahames & Wardlaw.*

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1867
*July* 16.

LIEUTENANT C. W. CAMPBELL, OF THE BENGAL CAVALRY, *et al.* . . . . . } APPELLANTS;
JOHN A. G. CAMPBELL OF GLENFALLOCH . RESPONDENT.

THE BREADALBANE CASE.

*Marriage—Habit and Repute—Connection originally illicit—Transmutation into Matrimony—Evidence.*

4 P. C. 31
19 Eq. 104-7.
2 Hag. Ecc. 651
1 Sw. & T. 363,

Cohabitation, with the required repute, as husband and wife, is proof that the parties between themselves have mutually contracted the matrimonial relation. It demonstrates that interchange of consent which alone constitutes marriage in *Scotland*. The law of habit and repute, however, is not peculiar to *Scotland*; although in countries where the facilities of matrimony are less than in *Scotland*, the evidence to establish the marriage must be stronger.

Marriage, technically, is not constituted, but evidenced, by habit and repute, which, for that purpose, must be uniform and positive.

A connection commencing in adultery may, on ceasing to be adulterous, become matrimonial by consent, and may be evidenced by habit and repute, the parties being at liberty to intermarry.

The alteration in the character of the connection, from adultery to matrimony, need not be indicated by any public act, or by any observable change in the outward demonstration.

It is not necessary to prove the specific period when the consent was interchanged.

*Per* LORD WESTBURY:—You must infer the consent to have been given at the first moment when you find the parties able to contract.

Comments by the Law Peers on *Cunningham* v. *Cunningham* and *Lapsley* v. *Grierson*.

*Legitimacy and Marriage.*

*Per* THE LORD CHANCELLOR:—Proof of the legitimacy of the offspring is proof of the validity of the marriage.

*Claim unduly deferred.*

*Per* LORD CRANWORTH:—It is in the last degree important that Courts of

justice should look with the utmost suspicion on the conduct of parties who intentionally keep secret matters at a time when they might be explained, in order to divulge them only when lapse of years may have made contradiction or explanation impossible.

IN 1781, *James Campbell*, of the *Glenfalloch* family, an ensign in the 40th Foot, then stationed at *Bristol*, became acquainted with *Eliza Maria Blanchard*, the young wife of a middle-aged grocer, named *Ludlow*. With *James Campbell* she eloped from her husband, who did not long survive her departure, for he died in January, 1784. The guilty parties, however, proved constant and true to each other. In 1782, they went to *America*, with *James Campbell's* regiment, he representing her as his wife. In 1783, an elder brother of *James Campbell*, writing from *Scotland* to another brother in *Jamaica*, stated that "He had had a letter from *James* in *America*," and that "he and *Mrs. Campbell* were both well;" the writer adding, "that he had not seen her, but that she was exceeding well spoke of."

In February, 1784 (a month after *Ludlow's* death), *James Campbell* and *Eliza Maria Blanchard* arrived in *England*, with his regiment, which returned from *Canada*. It was then open to them to join hands, but, judging from the evidence, they abstained from doing so.

In 1788, they had a son, their eldest; and the great question was as to his *status*—whether he was legitimate or not—that question depending on another question—whether his parents had ever lawfully intermarried.

After many wanderings in *England*, they settled ultimately in *Scotland*, the country of *James Campbell's* domicil. Residing there constantly from 1793 till his death, in 1806, they were universally reputed to stand towards each other in the sacred relation of husband and wife, although no regular marriage was ever shewn to have taken place between them.

Dreading, apparently, the effects of a public matrimonial celebration (which they knew was unnecessary in *Scotland*, and which might have roused suspicions, and instigated inquiry into the nature of their original connection), they seem to have relied throughout on the familiar doctrine of habit and repute, and they did everything in their power to satisfy its requirements. They

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passed themselves off uniformly, unequivocally, and constantly, as husband and wife; and they were received, and treated, and regarded as such by all their relations, associates, friends, and acquaintances; no one expressing or entertaining a doubt that the tie which bound them together was that of matrimony.

Their son aforesaid (namely, *William John Lambe Campbell*), and other children born to them afterwards, were, of course, deemed legitimate; the mother, on *James Campbell's* death, administering to his estate, and claiming and receiving from the *Horse Guards* a pension as his widow. She died in 1823.

In 1812, *William John Lambe Campbell*, on the death of his uncle, succeeded, without opposition or question, as heir of entail, to the family estate of *Glenfalloch*, which he enjoyed till his death, in 1850, when it devolved on his eldest son, the above Respondent, who, under the same title, and with perfect tranquillity, has possessed it ever since.

But on the death of the late Marquis of *Breadalbane* without issue, in 1862, an inheritance greater than *Glenfalloch* opened for competition. In a word, the deceased nobleman's vast landed estates in *Perthshire* and *Argyllshire*, with a rental of £50,000 per annum must go to the Appellant if he could but shew that the Respondent's father, *William John Lambe Campbell*, was illegitimate.

The Appellant, therefore, thought, and was advised, that the time had come to bring forward a question which had been permitted to slumber so long as the object to be gained by success was but the comparatively insignificant succession of *Glenfalloch*.

If *William John Lambe Campbell* was the lawful son of *James Campbell*, it was admitted that the Respondent must prevail. On the other hand, it was not disputed that if *William John Lambe Campbell* was illegitimate, the Appellant must succeed.

It happened that the Appellant discovered, or, at all events, produced, a letter written by *Eliza Maria Blanchard* in support of her application for a pension, in which letter she stated that her marriage with *James Campbell* had taken place in 1782, when she was, in fact, the wife of *Ludlow*.

It happened, moreover, that two remarkable decisions of the House of Lords were supposed to have so qualified the doctrine of

habit and repute as to favour the claim of the Appellant. The first of these cases, *Cunningham* v. *Cunningham* (1), was decided under the advice of Lord Chancellor *Eldon* and Lord *Redesdale*, in 1814, the marginal note being as follows:—

A man and woman, after a known illicit connection, cohabit together in such a way as to create a repute, though a divided one, of their being married persons; and the man, in order to get lodgings in the houses of persons of respectability, and to save the woman from rude treatment by one of his companions when drunk, acknowledges that the woman is his wife:—

*Held*, by the House of Lords, reversing a decision of the Court of Session, that the facts and circumstances were not sufficient to infer a marriage.

*Per* LORD ELDON:—In cases of cohabitation, the presumption is in favour of its legality.

*Secus*, if the connection is known to have been, in its origin, illicit.

*Per* LORD REDESDALE:—Repute to raise presumption of marriage must be founded on general, not singular, opinion; a divided repute is, on such a subject no evidence at all.

The second case was that of *Lapsley* v. *Grierson* (2), decided under the advice of Lord Chancellor *Cottenham* and Lord *Campbell*, in 1848; the marginal note being as follows:—

*A.*, a married Scotchman, went abroad, leaving his wife in *Scotland*. She cohabited with *C.*, and had children by him. To make such children legitimate, it was held necessary to prove either a legal origin of the cohabitation, or a change in the nature of it after the death of *A.* had become known to all the parties. The mere fact that *C.* and the woman continued to live together was not sufficient; and the children were held illegitimate, though born after *A.'s* death.

The Appellant insisted that the connection between *James Campbell* and *Eliza Maria Blanchard* came within the ruling of these cases, and that *William John Lambe Campbell* was, consequently, illegitimate.

The Court below ordered a proof of the facts to be taken by commission. A great body of evidence was collected, going over upwards of a century. The attempt to condense it, with any approach to satisfaction, has failed. Those who desire to master the leading particulars are referred to the Third Series of the Court of Session Cases, vol. iv. p. 867.

On the 13th of July, 1865, the Lord Ordinary found that the above Respondent was nearest and lawful heir of tailzie and provision in special of the deceased Marquis, in the lands in the pleadings specified; and he awarded costs against the Appellant.

(1) 2 Dow. 483. (2) 1 H. L. C. 498.

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The First Division of the Court below, before delivering their decision, called for the written opinions of the other Judges, conformably to statute.

On the 26th of June, 1866, the First Division, upon hearing counsel, and upon consideration of the opinions of the other Judges, adhered to the Lord Ordinary's interlocutor, and refused the Appellant's reclaiming note with costs. Hence the present appeal to the House.

The *Attorney-General* (1), The *Dean of Faculty* (2), Mr. *Anderson*, Q.C., and Mr. *Shiress Will*, appeared as counsel for the Appellant.

Sir *Roundell Palmer*, Q.C., Mr. *Mellish*, Q.C., Mr. *Young*, Mr. *Adam*, and Mr. *R. Berry*, for the Respondent.

The arguments, which turned on facts and evidence, are, for the purposes of a report, sufficiently adverted to in the following opinions.

THE LORD CHANCELLOR (3):—

The question to be determined upon this appeal is, whether the Respondent is entitled to be served heir of tailzie and provision to the late Earl of *Breadalbane*, under the designation of heir male of the body of *William Campbell* of *Glenfalloch*. And the determination of this question depends upon proof of the legitimacy of *William John Lambe Campbell*, the father of the Respondent.

The Respondent is descended from *James*, the second son, and the Appellant from *John*, the sixth son of *William Campbell* of *Glenfalloch*. Both parties are agreed that the descendants of the eldest son of *William Campbell* of *Glenfalloch* are extinct.

The claim of the Respondent is sustained by evidence which in itself is amply sufficient to support it.

*James Campbell* and *Eliza Maria Blanchard*, the father and mother of *William John Lambe Campbell*, lived together, and were reputed as husband and wife, for some years prior to his birth in the year 1788. But the Appellant asserts that *James Campbell*

(1) Sir *John Rolt*. (2) Mr. *Moncreiff*
(3) Lord *Chelmsford*.

and *Eliza Maria Blanchard* were never lawfully husband and wife; for that at the time of their supposed marriage *Eliza Maria Blanchard* was the wife of *Christopher Ludlow*, who was then living. The only proof of the marriage of the parties during the lifetime of *Ludlow* is contained in a letter written by *Eliza Maria Blanchard*, the grandmother of the Respondent, after the death of *James Campbell*, his grandfather, to which I shall hereafter refer.

The following leading facts are sufficiently established by the evidence.

*James Campbell* was an officer in the 40th Regiment. In 1780, and in the beginning of 1781, he was on the recruiting service at *Bristol*. About ten miles from *Bristol* is *Chipping Sodbury*, where *Christopher Ludlow* resided and carried on business as a grocer and apothecary. From *Chipping Sodbury*, *James Campbell* eloped with the grandmother of the Respondent, then the wife of *Ludlow*, and they afterwards cohabited together as husband and wife. *James Campbell* in August, 1781, was at *Glasgow*, and in September, 1781, at *Edinburgh*, still employed in the recruiting service; and it may fairly be presumed that Mrs. *Ludlow* was with him in both these places. In 1782 he went to *Nova Scotia* with recruits for the 40th Regiment. Mrs. *Ludlow* was with him there, and was passing as his wife, as appears by a letter from *Colin Campbell*, the brother of *James*, to *Duncan Campbell*, another brother, dated *Glasgow*, 7th September, 1783, in which he writes, "I had a long letter from *James* lately, from *Halifax*. He and Mrs. *Campbell* were both well." *James Campbell* left *Nova Scotia* in 1784, in the *Prince of Orange* transport, with a detachment of the 40th Regiment, and Mrs. *Ludlow* embarked with him as his wife, her name being entered on a list of those on board as "Mrs. *Eliza Campbell*." They arrived in *England* in February, 1784.

In the month preceding, an event had happened which has a most important bearing upon the case. *Christopher Ludlow*, probably in consequence of his wife's elopement from him, determined to leave the country. In July, 1781, he went out to *New York* as a hospital mate, and remained there till towards the end of 1783; and then sailed for *England*, but died on board the vessel just before she reached *Portsmouth*, in January, 1784.

From this time, and for some time afterwards, the evidence as

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to the movements of *James Campbell* and his reputed wife is very scanty. They landed at *Plymouth* from *Nova Scotia* in February, 1784, and appear to have been either there or at *Taunton* for some months. In April, 1785, *James Campbell* retired from the army. On the 30th of May, 1785, they had a daughter baptized at *Devonport*, under the name of "*Eliza Marlbrough*, daughter of *James* and *Eliza Maria Campbell*."

"Lieutenant in 40th Regiment."

I can hardly say that there is evidence of *James Campbell* having been at *Glenfalloch* in the year 1785. The tradition given by Mrs. *McNicoll*, as to hearing her father and mother speak of *William Campbell's* sons having been at a flood (which is proved to have happened on the 26th of July, 1785), and that one of these was *James*, and he was very clever at it, was hardly admissible. But having been admitted it proves nothing, as it does not appear that *James's* reputed wife was with him, and was received by the father as his daughter-in-law. Little is known of the parties from the time of *James Campbell's* leaving the army until the year 1793, when he joined the *Breadalbane Fencibles*. In the intervening period two children had been baptized at *Gateshead*,—*William John Lambe*, the father of the Respondent, in January, 1788, as the "son of *James Campbell*," and, in October, 1789, *Susannah Sophia*, as the "daughter of *James Campbell*." *James Campbell* continued in the *Breadalbane Fencibles* till the regiment was disbanded in April, 1799.

On the 11th of October, 1796, his youngest son, *Breadalbane Gavin*, was born, and baptized at *Inveresk* in the following month of November, as the son of Captain *James Campbell* of the *Breadalbane Fencibles*, and Mrs. *Eliza Maria Blanchard*. In or about the year 1799, *James Campbell* and *Eliza Maria Blanchard*, with their children, visited at *Glenfalloch*, where his elder brother *Colin* and his wife then resided. On the 23rd of August, 1799, *James Campbell* received a commission in the *Cambrian Rangers*, and at the latter end of the year embarked with the regiment for *Gibraltar*. He left *Eliza Maria Blanchard* and their children in *Scotland*, and after his arrival at *Gibraltar* he executed a general power of attorney to her, dated the 3rd of March, 1800, in which he describes her as "my wife, *Eliza M. Campbell*, residing at

*Musselburgh*, near the city of *Edinburgh*." The *Cambrian Rangers* returned to *England*, and on their being disbanded, in 1802, *James Campbell* appears to have resided with his wife in *Scotland* for the remainder of his existence, having, as it appears, been compelled upon two occasions to seek protection from arrest in *Holyrood* (1). On the 12th of March, 1804, he obtained letters of inhibition in the usual form against Mrs. *Eliza Maria Blanchard*, otherwise *Campbell*, as his wife. He died at *Edinburgh* on the 24th of October, 1806.

There appears to be the most conclusive evidence that from the first period of their cohabitation *Eliza Maria Blanchard* passed as the wife of *James Campbell*, and that for many years they were generally reputed to be husband and wife. But the evidence of the reputation of a marriage having existed between the parties does not end with the death of *James Campbell*. If they were not married, *William John Lambe Campbell* was illegitimate, and therefore every acknowledgment of his legitimacy by those who must have been acquainted with the way in which his parents were received and reputed in society is evidence in favour of their having been lawfully married.

Such an acknowledgment of the legitimacy of *William John Lambe Campbell* was made by the grandfather of the Appellant in the year 1812, when the succession to the estate of *Glenfalloch* opened under the entail, and *William John Lambe Campbell* was entitled to succeed if he was the eldest and lawful son of *James Campbell*. If he was illegitimate, *John Campbell* of *Boreland*, the Appellant's grandfather, was, through the death without male issue of the brothers intermediate between *James* and himself, entitled to the succession of *Glenfalloch*. So far, however, from *John Campbell* making any claim, he accepted a commission and factory from *William John Lambe Campbell*, empowering him to do everything that was necessary towards his nephew's being served heir to *John Breadalbane Campbell* in the lands of *Glenfalloch*. A claim was accordingly given in for *William John Lambe Campbell* to be served nearest and lawful heir male of taillie and provision in special of his cousin, *John Breadalbane Campbell*, "late of

(1) *Holyrood Palace*, with its precincts, a sanctuary for debtors, saving them from personal arrest.

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*Glenfalloch*." On the 18th of March, 1812, he was served in terms of his claim. His service was afterwards retoured to Chancery, and his title completed by precept from Chancery and instrument of sasine following thereupon on the 18th of June, 1812. By these proceedings it was established in the words of the retour: "*Quod dictus Gulielmus Johannes Lambe Campbell est unicus filius dicti demortui Jacobi Campbell filii secundi dicti demortui Gulielmi Campbell, et legitimus et propinquior hæres talliæ et provisiones dicti Joannis Breadalbane Campbell ejus consanguinei.*"

The Respondent's father continued in the undisturbed possession of the lands of *Glenfalloch* under this title until his death in 1850, and the Respondent was then served nearest and lawful heir of taillie and provision to his father, and has ever since been in possession.

The lands of *Glenfalloch* are held under an entail, containing the same limitations to the heirs male of the body of *James Campbell* as that which is contained in the entail of the *Breadalbane* estates.

It is not contended that the part taken by the Appellant's father in the service of the Respondent's father as heir to the lands of *Glenfalloch* precludes the Appellant from disputing the Respondent's claim founded upon the same title; but it must be admitted to be a very strong recognition of the legitimacy of the father of the Respondent by a relation who had ample means of knowing how he was reputed in the family, and the strongest interest to dispute his title to the succession, if he thought it did not rightfully belong to him. The evidence for the Respondent establishes, beyond all doubt, that his father throughout his life was uniformly treated and recognised as the legitimate son of *James Campbell* by all the family of the *Campbells*, as well as by Lord *Breadalbane* and his relations.

Under these circumstances, every presumption is in favour of the Respondent's title, and the Appellant must be required to overcome that presumption by the proof of facts which are utterly inconsistent and irreconcilable with it. This he proposes to do by proving that the original cohabitation of the Respondent's grandfather and grandmother commenced with an unlawful marriage

after their elopement, and from that time the habit and repute began which constitutes the only evidence of a marriage between them; that there never was any marked change in the nature of the cohabitation, and that without such a change a connection which is illicit in its origin cannot become the foundation of such habit and repute as will be sufficient proof of a subsequent marriage having taken place.

The Appellant's case rests entirely upon the letter of *Eliza Maria Blanchard* to the War Office, dated the 23rd of June, 1807, containing her application for a pension as the widow of *James Campbell*. There may, perhaps, be some doubt whether this letter was admissible in evidence, but, at all events, being written for a particular purpose the statements in it are not as trustworthy as if they had been made without any motive of interest. The material parts of this letter are those in which the writer says:

> I applied to the half-pay agent respecting the widow's pension, and have made oath before a magistrate; but as I unfortunately lost my marriage lines in *America*, I am informed it cannot be procured. My husband was ensign and lieutenant in the 40th regiment of foot during the war with that country. At the end of the year 1780 he came to *England* to recruit; and in September, 1782, I was married to Mr. *Campbell*, in *Edinburgh*, by Mr. *McGregor*, the Gaelic minister, who is also dead, as is Ensign *Wm. Willox*, of the 40th, who was witness to our marriage; and the June following we went to *America* in the fleet that took out the preliminaries of peace twenty-five years ago. The present Gaelic minister has been wrote to, and he says that he got no register from any of his predecessors.

The Appellant proves the truth of some of the particulars mentioned in this letter, but proposes to read the statement of the time of the marriage as September, 1781, instead of 1782, because it is shewn that *James Campbell* was at *Edinburgh* in the September of the former year. This is to assume that *Eliza Maria Blanchard* intended to be perfectly accurate in everything which she stated in her letter. But this is rendered doubtful by the certificate prepared by her agent, in which the time of the marriage is represented to be the 14th of September, 1783; she herself, in an affidavit made before a magistrate, merely swearing that she was lawfully married to *James Campbell*, without naming any time. I think that the assertion of a marriage with *James Campbell*, either in 1781 or 1782, must not be implicitly relied upon. In applying

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for her pension it was necessary for the alleged widow to state particularly her marriage, and the date of it, and also to produce her marriage certificate, or to account for its non-production. This might have suggested the plausible story of the loss of her marriage lines in *America*, without that statement necessarily leading to the belief that any such proof of a marriage ever existed. It would not have done to represent to the War Office that the only evidence she had of a marriage was that of habit and repute; and having to fix a certain time for the marriage, she could not well give a later date than the period when her cohabitation with *James Campbell* must have been first known to the family, as she would have run the danger of disclosing a fact which was probably unknown to them, the discreditable commencement of her intercourse with him. More especially must she have been anxious to preserve the good opinion of Lord *Breadalbane*, to whom she referred in the letter in question, and who afterwards gave a certificate that he believed her to be the wife of *James Campbell*. It is difficult to believe that the parties could have incurred the risk of having a ceremony of marriage performed, which they must have known would not have made them any more effectually husband and wife than their continuing to cohabit with the reputation of that relation subsisting between them. It was not at all necessary to have any written proof of a marriage to enable her to embark for *America* as the wife of *James Campbell*. And it is rather a significant circumstance that, although the date of 1782 is mentioned in the letter, and that of 1783 in the certificate, no date is specified in her affidavit, wherein she swears merely that she was lawfully married to *James Campbell*, which was perfectly true if at any time during *James Campbell's* life a marriage had taken place between them.

But whether a marriage actually took place during the lifetime of *Christopher Ludlow*, or the cohabitation of the parties was merely an adulterous intercourse without any marriage ceremony, the Appellant contends that, beginning in an illicit connection, the presumption of subsequent marriage from the continuance of it altogether ceases, and that nothing short of proof of actual marriage, or of such a total change in the character of the cohabitation as will amount to habit and repute of a marriage, will be sufficient

to establish the Respondent's title; and that upon the evidence it appears that the connection between *James Campbell* and *Eliza Maria Blanchard* continued the same from the beginning to the end.

A great number of cases were cited in support of this proposition of the Appellant, but those mainly relied upon were *Cunningham* v. *Cunningham* (1), and *Lapsley* v. *Grierson* (2).

In the case of *Cunningham* v. *Cunningham* an action of declarator of legitimacy was brought by the two daughters of Mr. *John Cunningham* and *Agnes Hutcheson*, his spouse; and the summons, after alleging that the Complainers were begot in lawful marriage, went on to state that, "at least, if the Complainers were procreated or brought forth before the said *John Cunningham*, their father, and the said *Agnes Hutcheson*, their mother, were actually married, they were afterwards legitimated by a marriage which took place betwixt their said father and mother, and they have been always held and reputed to be lawful children." The onus of proving the marriage of their parents either before or after their birth was upon the Pursuers; and the decision proceeded entirely upon failure of the proof on which their legitimacy depended. The leading facts were, that in 1758 Mr. *Cunningham* hired *Agnes Hutcheson* as a servant, and in the following year she bore him a child. They were both rebuked for fornication by order of the Kirk Session. That from 1760 to 1768 *Cunningham* lived with *Agnes Hutcheson* in various places; and in the latter year the succession to *Balbougie* opened to him as heir male, and they went to live there, and continued till 1770, when *Agnes Hutcheson*, being in ill health, was sent to *Edinburgh*, where she died, and was buried in *Canongate Church* as an unmarried woman, *Cunningham* sending his cowfeeder, or bailiff, to see her buried. As Lord *Eldon* says: "She was buried with hardly the decencies of the most ordinary funeral, and laid in the grave, not in the character of a wife, but of a mistress."

Upon the facts of the case Lord *Eldon's* remarks are pointed and pertinent, but were clearly not intended for general application. His Lordship said: "When the cohabitation of a man and woman was not known to have been in its origin illicit, the

(1) 2 Dow. 483. (2) 1 H. L. C. 498.

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presumption was that it was lawful. But where it was first notoriously illicit, and where a change in the character of the connection must be operated, and when they found the means employed for that purpose to be such as left half the world in doubt,—the servants, the relations,—one half thinking one way, the other half the other, at what time, in what circle, could it be said that there was such a habit and repute as raised the presumption that the parties had mutually consented to be husband and wife." And Lord *Redesdale*, after observing that repute must be founded, not on singular but on general opinion, stated it as his opinion that there was not there such evidence of repute as was necessary to establish the fact of a marriage by "presumption." From the language of the two noble and learned Lords which I have quoted, I gather that if, notwithstanding the nature of the original connection, there had afterwards grown up a general reputation that the parties had become man and wife, they would have been of opinion that the evidence would have established the presumption of a subsequent marriage.

The case of *Lapsley* v. *Grierson*, which in its circumstances approaches more nearly to the present case, depended, as the Lord Chancellor (1) said, on the evidence as to the facts: "That evidence" (he held) "establishes the fact that cohabitation had commenced when *William Paul* was living. The nature of that cohabitation was not altered by any undoubted and open act of the parties; there was no change in their demeanour after the period at which it is now believed he died." And Lord *Campbell* said: "The Pursuers rely on the marriage of the parents to be established by habit and repute, which may establish a marriage, by affording evidence of consent. On the other hand the Defender relies on the rule of the law of *Scotland*, which is not disputed, that if the connection was in the beginning illicit it must continue to bear that character unless it is clearly changed by the parties. That rule was established by this House in the case of *Cunningham* v. *Cunningham*, and has ever since been the settled law of *Scotland*." And his Lordship added, "the connection was illicit in its origin, and there does not seem to be any reason for saying that its nature was afterwards changed."

(1) Lord *Cottenham*.

The peculiar circumstances of this case, which it was agreed was one entirely of facts, must be regarded in considering the dicta of the noble and learned Lords who decided it. There was no proof that *William Paul*, the husband of *Janet Mackinlay*, was not living during the whole of the lifetime of *John Lapsley*. *Janet Mackinlay*, within a few months of *Lapsley's* death, instituted proceedings to establish her rights as a widow, in which she was resisted by the family of the *Lapsleys*, and the case was decided against her on the ground that she had failed to prove that her former husband had died either before the connection with *John Lapsley*, or during its continuance. The two children of *William Lapsley*, a brother of *John Lapsley*, were in 1819 served heirs of the property, to which the children of *John Lapsley*, if legitimate, were entitled. The property was sold by them in 1826, and ten years afterwards, in 1836, the Appellants instituted a suit to reduce or annul the title of the purchasers of the property, and to have themselves declared the lawful children of *John Lapsley*. The Appellants, who had not been reputed legitimate, but the contrary, by their action of declarator of legitimacy sought to acquire a status which they did not possess, and were bound to satisfy the onus upon them by clear evidence of the lawfulness of the marriage of their parents, which they failed to produce.

But taking the rule to be settled by the case of *Cunningham* v. *Cunningham*, that an illicit connection at the beginning can only be changed in character by some undoubted and open act of the parties, let us consider whether the circumstances of the present case, differing as they do from any which have been cited, are not sufficient to establish a marriage between *James Campbell* and *Maria Blanchard*.

It must be remembered that we are dealing with facts which commenced more than eighty years ago, with an undoubted general repute of marriage for a great number of years, and with an uninterrupted recognition of legitimacy during the whole of the lifetime of the Respondent's father. Under such circumstances, we are bound to make every reasonable presumption to support the Respondent's case.

The Appellant contends that the habit and repute of the parties being man and wife was the same during the period of the adul-

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terous connection as after the death of *Christopher Ludlow*, and that it continued unchanged down to the death of *James Campbell*, in 1806. But is this a correct view of the case?

It may be assumed, from the letter of *Colin Campbell* to his brother *Duncan*, that in September, 1783, it was believed by the family of the *Campbells* that *James Campbell* was married, and therefore, so far as the family was concerned, that he and *Eliza Maria Blanchard* were considered to be husband and wife. But this did not amount to habit and repute, which arises from parties cohabiting together openly and constantly as if they were husband and wife, and so conducting themselves towards each other for such a length of time in the society or neighbourhood of which they are members as to produce a general belief that they are really married persons. Now, during the whole time of the cohabitation, down to the death of *Christopher Ludlow*, *James Campbell* and *Eliza Maria Blanchard* were not living in the neighbourhood and society of his family, and therefore the reputation in the family of their being married was nothing more than the private opinion of the members of it. But if this is sufficient to constitute habit and repute, so far as the family of the *Campbells* was concerned, yet as, according to Lord *Redesdale*, in the case of *Cunningham* v. *Cunningham*, "repute must be founded, not in singular but in general opinion" of relations, and friends, and acquaintances, the whole family of the *Ludlows* must have known that the parties could not be lawfully married during the lifetime of *Christopher Ludlow*.

The case, therefore, never began with habit and repute; nor could it have had any origin at all in the sense in which it induces a presumption of marriage, until after the death of *Ludlow*. That event happened in January, 1784, and opened the way to a change from an adulterous connection to a lawful marriage. A question was made, whether *James Campbell* and *Eliza Maria Blanchard* were ever aware of the death of *Ludlow*. But without entering into any nice examination of probabilities, as any conclusion upon the subject must be conjectural, and even if the parties possessed full knowledge of the event, the Respondent must be unable to prove it, I think we are bound to presume that they had received information of a fact so important to be known by them. From this time the nature of the relation which subsisted between them

was entirely changed; and although from 1784 to 1793 there is very little evidence of their movements, and for some part of the time they appear to have been residing near *Gateshead*, where two children were baptized as legitimate children of *James Campbell*, yet there is nothing to shew that during these many years they may not have visited *Scotland*, and that an actual marriage by present consent may not have taken place between them. That this is not altogether improbable appears from the affidavit which *Eliza Maria Blanchard* made before the magistrate upon her application for a pension, to which I formerly referred. In her letter to the War Office it was necessary for her, in order to attain her object, to assign a date to her alleged marriage, which she must have known to be false. But in her affidavit she merely swears that she was lawfully married to *James Campbell*, which was true if she was married to him after the death of *Christopher Ludlow*, but false if she meant to refer to the date in her letter, or if no marriage took place between them after *Ludlow's* death.

From 1793 down to 1806, the evidence is clear and distinct of an universal recognition of the parties as husband and wife by every member of the family, and by all persons with whom they associated; and there is nothing whatever to break in upon the uniformity of this recognition. In the letter of *Eliza Maria Blanchard*, upon which the Appellant founds his opposition to the Respondent's claim, she says, "Lord and Lady *Breadalbane* know me, and I have frequently had the honour of dining with them while my husband was in his lordship's regiment." It is not to be supposed that she would have been thus received if she had not been known, or at least believed to be, the wife of *James Campbell*. If the case were confined to the period between the year 1793, and the death of *James Campbell*, in 1806, it would be amply sufficient to establish a conclusive presumption of marriage by habit and repute. And it appears to me that it is not competent for the Appellant to go back to an anterior period (no matter how distant) when an illicit intercourse existed between the parties, in order to shew that the matrimonial relation must have been simulated. The argument on the part of the Appellant goes the length of contending that if cohabitation commences by illicit intercourse a marriage can never be afterwards established by

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habit and repute. But, as I read the case of *Cunningham* v. *Cunningham*, if the habit and repute had been uniform and general, although the connection, in its origin, was notoriously illicit, this House would have decided that case differently.

After a close and careful examination of the facts of this case (for, like the cases which have been cited in the argument, it depends entirely upon the facts), I am clearly of opinion that the strong presumption in favour of the marriage of the Respondent's grandfather and grandmother, and of the legitimacy of his father, has not been shaken by any proof adduced by the Appellant, which is inconsistent with the Respondent's title, and that the interlocutor appealed from ought to be affirmed.

LORD CRANWORTH:—

My Lords, I have come to the conclusion, upon the evidence before us, that *James Campbell*, from March, 1793, till his death, was treated by every one as the husband of *Eliza Maria*, formerly *Blanchard*.

I think it right to advert to a fact which, in this inquiry, must be constantly kept in view, namely, that *James Campbell's* domicile was invariably Scotch.

His domicile of origin was certainly Scotch, and he retained that domicile till his death.

There would be no change of domicile from the mere fact that he was serving in the 40th Regiment in *England*, and his poverty and destitution may well account for his having for many years led a wandering and unsettled life.

In November, 1806, *James* died in *Scotland*, and *Eliza Maria* then came to *London*, and established herself there as her home. *Daniel*, the child of *Christopher Ludlow*, had been brought up by his grandfather, and had become a medical man in *London*. I do not think it necessary to go into the evidence in detail, which shews that he was there recognised by *Eliza Maria* as being her child. He was treated as her child by what she described as her first marriage, and, therefore, as being the half-brother of *William John Lambe Campbell*, her only surviving son by *James Campbell*. The Appellant properly relies on this subsequent recognition of *Daniel* as clearing up all doubt which might have been felt on the

evidence connecting her with the elopement. It seems to me to put that part of the case beyond doubt.

The facts of the case, therefore, as represented by the Appellant, are these:—In 1780, or 1781, *James Campbell* eloped with *Eliza Maria*, the wife of *Christopher Ludlow*, and lived with her in adultery, passing her off as being, and leading his relatives and friends to believe that she was, his wife. This system of deception continued up to his death; and though, in January, 1784, *Christopher Ludlow* died, and the intercourse therefore ceased to be adulterous, yet the Appellant contends that there was no change of circumstances which justifies the belief that any marriage ever took place between them after marriage had become possible. That the connection was, as alleged by the Appellant, adulterous in its origin, seems to me to be satisfactorily made out; and the only question is, whether there are circumstances which ought to lead your Lordships to concur with the decision of the great majority of the Judges below in the conclusion that a lawful marriage ought to be presumed to have taken place after it had become possible by the death of *Christopher Ludlow* in January, 1784.

It was properly argued at your Lordships' bar, and not, as I understood the counsel for the Respondent, disputed, that marriage can only be contracted in *Scotland* by the mutual agreement of both parties to become husband and wife. There is, however, no particular form or ceremony by which such agreement must be manifested, except, indeed, that the parties must, in order to constitute a marriage *de præsenti*, be in the presence of each other when the agreement is entered into, and it must be an agreement to become husband and wife immediately from the time when the mutual consent is given. I do not understand the law as even requiring the presence of a witness as being essential to the validity of a marriage, though, without a witness, it may be difficult to establish it.

The great facility which the law of *Scotland* affords for contracting marriage has given rise to rules and principles which have been sometimes considered peculiar to that law. By the law of *England*, and, I presume, of all other Christian countries, where a man and woman have long lived together as man and wife, and

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have been so treated by their friends and neighbours, there is a *primâ facie* presumption that they really are and have been what they profess to be. If after their deaths a succession should open to their children, any one claiming a share in such succession as a child would establish a good *primâ facie* case by shewing that his parents had always passed in society as man and wife, and that the claimant had always passed as their child. If the validity of the parents' marriage should be disputed, it might become necessary for the person claiming as their child to establish its validity, and, inasmuch as in *England* all marriages are solemnized in public, and publicly recorded, it is reasonable to require the claimant to give positive evidence of its celebration, or else to explain why he is unable to do so. The principle is the same in *Scotland;* but as marriage there is not necessarily celebrated in public, or recorded, it is much more probable than it would be in *England* that there may have been a marriage, but that there may be no means of giving direct proof of it. Those who have to decide, after the death of parents, on the legitimacy of children, must, much oftener than in *England*, have to rely solely on the *primâ facie* evidence afforded by the conduct of the parties towards one another, and of their friends and neighbours towards them. This sort of evidence is spoken of in *Scotland* as *habite* and *repute*. Persons are sometimes said to be married persons by *habite* and *repute*.

I agree, however, with the argument of the Appellant, speaking with deference to those who think otherwise, that this is an inaccurate mode of expression. Marriage can only exist as the result of mutual agreement. The conduct of the parties, and of their friends and neighbours, in other words, *habite* and *repute*, may afford strong, and, in *Scotland*, attending to the laws of marriage there existing, unanswerable evidence, that at some unascertained time a mutual agreement to marry was entered into by the parties passing as man and wife. I cannot, however, think it correct to say that *habite* and *repute* in any case make the marriage. Repute can obviously have no such effect. It is, perhaps, less inaccurate to speak of *habite* creating marriage, if by the word "*habite*" we are to understand the daily acts of persons living together, which imply that they consider each other as husband and wife, and it may be taken as implying an agreement

to be what they represent themselves as being. It seems to me, however, even here to be an improper use of the word to say that it makes marriage. The distinction is, perhaps, one rather of words than of substance; but I prefer to say that *habite* and *repute* afford by the law of *Scotland*, as, indeed, of all countries, evidence of marriage, always strong, and in *Scotland*, unless met by counter evidence, generally conclusive.

In the present case the evidence of *habite* and *repute* would have established conclusively, to my mind, the title of the Respondent, if there had been no evidence of anything prior to 1793. The question is, as to the effect of the evidence establishing the adulterous origin of the connection between *James Campbell* and *Eliza Maria Ludlow*. Now, considering this first, on principle, and independent of authority, I cannot treat the question as one of law. Where a man and woman have lived together as husband and wife, at a time when they could not be husband and wife, and where they continue to live together in the same manner after it has become possible for them to become husband and wife, the question whether they have become husband and wife is a question not of law, but of fact. The law permits them to create that relation between themselves, and whether they have done so must be decided like any other question of fact. The circumstance that they represented themselves to be man and wife, when they knew they were not so, may reasonably be taken into account in estimating their subsequent conduct. It may neutralize the effect which would otherwise have been properly given to their subsequent cohabitation, *i.e.*, it may do so as matter of fact; I cannot think it must do so as matter of law; and if that be so, then all which any tribunal can do which has to deal with such a question is, to look to all the circumstances of the case, and consider whether they do, or do not, lead to the conclusion that the parties did contract marriage at some time after it was possible for them to marry.

Now here, as *Christopher Ludlow* died in January, 1784, there was nothing to prevent *James Campbell* from contracting marriage with his widow after that date. There is no direct evidence that they knew of his death, but the question of his being or not being alive was one of deep interest both to *James Campbell* and to *Eliza*

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*Maria*. *Christopher Ludlow* was well known at *Chipping Sodbury*. His death was noticed both in the *Bristol Journal* and the *Bath Chronicle*, and I cannot hesitate to come to the conclusion that it could not have long remained a secret to his widow, or to Captain *James Campbell*. If then, they could have contracted marriage at any time after January, 1784, and in fact lived together as husband and wife from that time up to the time of the death of *James*, above twenty-two years afterwards, why are we to assume that their *status* was not that which they represented it to be? If they had never lived together previously to the death of *Christopher Ludlow*, if they had only become acquainted when her *status* was that of a widow, I can hardly think it could have been doubted that there was such long and uninterrupted *habite* and *repute* as to afford conclusive evidence of their being husband and wife. How is this conclusion affected by the circumstance that they passed themselves off as man and wife when they were not so? I cannot say that this circumstance leads me to think there was even an improbability that they would marry when it was possible they could contract that relation with each other.

It must be borne in mind, that as he was always a domiciled Scotchman, and for the last thirteen years of his life living in *Scotland*, except during the short time when he was with his regiment at *Gibraltar*, marriage contracted at any time before his death would be sufficient to give the *status* of legitimacy to his children. It seems to me that he had the strongest motives for desiring to be married, and none operating in a contrary direction. He always represented *Eliza Maria* to be his wife, and introduced her as such into society. He must have known that he was the next heir in the *Glenfalloch* entail to succeed, in case his brother *Colin* should die without issue male. *Colin*, it is true, left a son, but still the chance was by no means remote that this son might die without issue male, the event which, in fact, happened six years after his own death. The evidence to which I have already referred shews very clearly that *Eliza Maria* was strongly attached to her children, and went through severe struggles in bringing them up. I see no reason to doubt that he had the same feelings towards them as she had. If he knew that he was not, and desired not to be, her husband, I cannot understand his conduct in issuing the

inhibition warning tradesmen not to trust her. It would have been easy for him to give notice that she was not his wife.

The hypothesis is, that though he certainly desired that the world should suppose him to be her husband, he might not desire really to be so; that he might wish to be able at any time to get rid of the connexion. To such a suggestion, I can only say that it is one which may always be made in the case of persons who have passed their lives as husband and wife, but as to whom there is no direct evidence when and where the marriage contract was entered into; persons, in short, who, in the language of Scotch law, are said to be married persons only by *habite* and *repute*. And it is a suggestion to which it is very dangerous to listen, after the deaths of those who, if it had been made in their lifetime, or the lifetime of either of them, might have been able to clear up all doubts.

Even if at an earlier stage of their connection *James Campbell* might have been desirous of getting released from it, it is very difficult to suppose he could have had such a wish when she had given birth to many children, all of whom were born when they might have been, what he certainly represented them to be, his legitimate children. How often do we find, that when a man has been living with a woman as his mistress, under the impression that he will be glad to get rid of the connection at some future time, and to be at liberty to contract marriage with another, if the conduct of the woman has been irreproachable, except in her connection with him, and he has lived long with her, and more especially if he has a family by her, his feelings become bound up with hers, and there is hardly any sacrifice he would not make to be able to convert the illicit into a lawful connection, to cause the woman to have been his wife from the first, and to remove from his offspring the taint of bastardy. In *England* this cannot be done. In *Scotland* it may. I will not on this occasion make even a single observation on the policy of the Scotch marriage law. But that law being such as it is, the presumption seems to me very strong, almost irresistible, upon all the evidence before us, that during the twenty-two years after the death of *Christopher Ludlow*, during which *Eliza Maria* lived with *James Campbell* as his wife, and bore him six children, and was received and treated

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as his wife by his family and friends, and, so far as appears, by all who knew them, he must have desired to make her his wife, and his children legitimate, and this he might have done at any time during those twenty-two years.

The circumstance of his having introduced her as his wife during the life of *Ludlow*, when she certainly was not his wife, does not lead me to any conclusion different from that at which I should have arrived if that had not been the case. I am not sure that it does not rather strengthen than weaken the presumption of actual marriage. It shews a strong desire that she should occupy a respectable position in society; and it is hard, therefore, to believe, that having had for above twenty-two years the daily opportunity of giving her the *status* which, even when she did not rightfully enjoy it, he was anxious to have it believed that she had acquired, he should not have profited by the law which put it in his power to confer it upon her.

There is, however, a circumstance greatly relied on by the Appellant, and which is calculated, more or less, to cast a doubt on the presumption which the conduct of the parties would otherwise fairly have raised. I allude to the letter written by *Eliza Maria* after *James Campbell's* death, when she applied for a pension as his widow. He died, as I have already stated, on the 24th of October, 1806, and she then came to *London*, being, as I collect from the evidence, in great pecuniary distress. Having obtained from the Prerogative Court letters of administration to Captain *James Campbell*, as his widow, she wrote to the War Office claiming a pension in the same character. In order to get the pension it was necessary that she should satisfy the authorities that she had been married to him; and in that letter she stated that she was married to him in September, 1782, at *Edinburgh*, by Mr. *McGregor*, the Gaelic minister. There is evidence to shew that in September, 1781, *James Campbell* was at *Edinburgh*. He certainly was not there in September, 1782, for he was then with his regiment in *Nova Scotia;* but there are fair grounds for supposing that the date, September, 1782, was a mistake, and that September, 1781, was intended. Her letter states that she had, unfortunately, lost her marriage lines in *America*, and the parol evidence shews that she had, on different occasions, made a similar statement. The

argument of the Appellant is, that on this evidence the inference is irresistible, that Mrs. *Ludlow* had accompanied or followed *James Campbell* to *Edinburgh*, in 1781, and had then gone through a ceremony of marriage at a time when no marriage could have been validly contracted; for whether the date is to be taken as 1781 or 1782, *Christopher Ludlow*, the husband of *Eliza Maria*, was then alive.

That she meant by this statement to induce the belief that she had been validly married before she was in *Nova Scotia*, passing as the wife of *James Campbell*, seems to me not to admit of doubt. But two questions then arise:—first, did any such marriage, or, rather, ceremony of marriage, then take place? secondly, if it did, is that circumstance sufficient to rebut the presumption of a valid marriage after the death of *Christopher Ludlow*, which, but for the invalid ceremony of marriage, the evidence would have warranted?

As to the first question, I think the evidence preponderates in favour of the conclusion that such a ceremony of marriage did take place in 1781, though the parties must have known it was invalid. The woman thereby would acquire what she called "marriage lines," and would thus possess, against all the world who did not know anything of her marriage with *Christopher Ludlow*, apparent proof of her status as the wife of *James Campbell*. It is, therefore, not, I think, improbable, that in order to acquire this advantage, the parties might even consent to run the risk of a prosecution for bigamy.

But, assuming such a ceremony to have been gone through, the question still remains behind, whether its existence is sufficient to rebut what would, I think, have been, if it had not existed, the irresistible presumption of marriage afforded by the rest of the evidence. I think not. This bigamous marriage ceremony did not prevent the parties to it from afterwards becoming husband and wife, if they were minded so to do. The letter is but hearsay evidence, and can only be looked to as a declaration by a member of the family, made in a matter of pedigree, in connection with all the other evidence. Its effect is to shew that she was not a member of the family, and, consequently, not a person whose declarations could be received. I have some doubt whether this letter, if objected to, could have been received in evidence; but I

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mention the doubt only to prevent its reception being supposed to have received the sanction of the House. I shall deal with it as evidence in the cause. It was a declaration made for a special object, behind the backs of all parties interested in disputing or explaining it. Nothing could be more natural than that the woman who had for a quarter of a century passed as the wife of *James Campbell*, should, after his death, for the sake of her own honour, and that of her children, wish it to be believed that her marriage preceded the time when she lived with him as his wife. And as nothing whatever was known about her marriage with *Christopher Ludlow*, or her elopement with *James Campbell*, it is natural that, when called on to shew that she was the widow of *James Campbell*, she should refer to a ceremony which, if valid, would have established, not only her status, but her honour, and the validity of which she must have known, by the experience of a quarter of a century, that there was no probability of any one calling in question.

These considerations lead me to the conclusion that the inference of marriage afforded by the evidence is not removed by the fact that after the death of the husband, his widow, to effect a particular object, represented the marriage to have taken place at a different date, and in a different manner from that which really gave it efficiency. I cannot but infer from all which occurred with respect to the mode in which these persons lived together, not only that they desired to be husband and wife, but also that they believed themselves to be so. In such circumstances we ought to infer, after their deaths, that at some time during the long period during which they lived together, and in some manner, however informal, they did that which they could do without any difficulty, viz., enter into an agreement to be or become married persons, and so to acquire for themselves and their children the status which the evidence satisfies me they wished to enjoy.

I have considered this case hitherto, with reference to what I think ought to be the decision, on principle only, and independently of authority. But it was pressed upon us that we could not come to a conclusion which should affirm the judgment below without overruling two important decisions in your Lordships' House; one, that of *Cunningham* v. *Cunningham*, generally cited as the

*Balbougie Case*, determined in 1814, when Lord *Eldon* held the Great Seal (1); the other, that of *Lapsley* v. *Grierson*, decided in 1848, when Lord *Cottenham* was Chancellor (2). These cases, it was contended, established the proposition, that where the connection between a man and woman was illicit in its origin, there the presumption of marriage from habit and repute is at an end, or, at all events, is at an end until some change of circumstances takes place, such as did not exist in this case.

I have examined these cases with great attention, but I cannot think that they warrant any such conclusion. In the *Balbougie Case*, the connection in its origin was between Mr. *John Cunningham*, Provost of *Inverkeithing*, and his female domestic servant, *Agnes Hutcheson*. She gave birth to a child; both parties were censured for fornication, and Mr. *Cunningham* stated that he had doubts whether the child was his. The connection was, therefore, clearly illicit in its commencement. It continued for above twelve years, when the woman died at *Edinburgh*. Mr. *Cunningham* sent his bailiff, or cow-feeder, to see her buried. She was buried as an unmarried person, by the name of *Agnes Hutcheson*, and was laid in the grave in the character, not of *Cunningham's* wife, but of his mistress. *Cunningham* afterwards married. He had issue by *Agnes Hutcheson* two daughters, and twenty years after her death these daughters instituted proceedings which eventually came up to this House, by which they sought to establish their legitimacy, on the ground that their parents were married persons. The Lord Ordinary, and afterwards the Inner House, found facts and circumstances sufficient to infer marriage, but that decision was reversed in the House of Lords. Lord *Eldon*, in moving the reversal of the interlocutors, examined very closely, and with minute accuracy, the whole of the evidence from which the Court of Session had inferred the marriage, and, finally, came to the conclusion that the facts were not such as to warrant the inference. In the course of the observations which he made, he more than once adverted to the fact that the connection was certainly illicit in its origin, and he said that mere cohabitation as man and woman was not cohabitation as husband and wife, and he came to the conclusion that there was nothing to warrant the

(1) 2 Dow. 483. (2) 1 H. L. C. 498.

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inference that what was certainly in its commencement a mere cohabitation as man and woman ever became anything else.

The decision does not appear to me to have been a decision that a connection which in its origin was only that of man and woman, could not become the connection of husband and wife; nor is it a decision that to constitute marriage any particular forms or acts were necessary, which except for the illicit origin of the connection would not have been required. When the connection is in its origin illicit, more evidence, or different evidence, may or may not be necessary to satisfy a Court that marriage has been contracted. Still it is a matter which must always depend on the particular facts in proof, and I cannot understand Lord *Eldon* as deciding more than that in the *Balbougie Case* there were not such facts as would justify the inference.

The other case is that of *Lapsley* v. *Grierson*, where it appeared that *John Lapsley* cohabited with a married woman, *Janet*, the wife of *William Paul*. The cohabitation commenced in or about 1801, and continued till 1810, when *John Lapsley* died. There were children, the fruit of that cohabitation, born between 1807 and 1810. The report states it as a fact in the case, that *William Paul* was lost at sea in 1804 or 1805, but on referring to the printed case, I do not find that to have been either proved or admitted. The children set up a claim in the Court of Session to certain heritable property, as being the lawful children of *John Lapsley*, and the Lord Ordinary found that the parents of the Pursuers, "were cohabiting, and generally held by habit and repute to be married persons for three years at least prior to the death of *John Lapsley* in 1810, and consequently that the Pursuers were entitled to and did possess the status and repute of his lawful children."

That interlocutor was reversed by the Inner House, and your Lordships sustained the reversal. The Lord Chancellor, Lord *Cottenham*, said that the case depended on the evidence as to the facts. They began to live together when they certainly knew they were not, and could not be, husband and wife. Even if it was to be taken as proved that *William Paul* died before 1810, Lord *Campbell* says he was satisfied that neither of the parents believed that to be so. They lived together, believing the nature of the

connection to have been unchanged during the whole period of its continuance; and Lord *Campbell* observed there was *mala fides* from the beginning to the end of the proceeding.

Both of these cases were decided on their special facts, and I do not feel that they at all precluded the Court of Session from coming to the decision at which they arrived in favour of the Respondent.

There is only one further observation which I desire to make. It relates to the evidence given for the Appellant by Mrs. *Charlotte Olympia Cockburn Campbell*, the Appellant's mother. She married his father in March, 1832, and she tells us that shortly afterwards her uncle, Sir *Patrick Campbell*, expressed his surprise that her husband, knowing there were suspicions as to *William John Lambe Campbell's* legitimacy, did not challenge his possession of *Glenfalloch*, adding that his (Sir *Patrick's*) brother could help him in proving his case. But her husband refused to do so, saying he would wait to see whether the Marquis of *Breadalbane* died without issue male, and if that should happen he would then shew to the world that he was the right heir, and he told the witness that she had all the papers, and knew the secret.

Taking this evidence to be true, the conduct of this witness's husband, the Appellant's father, seems to me open to much observation. We have no satisfactory evidence as to what was the value of the *Glenfalloch* estate. But in the Petition presented by the widow of *William Erskine Campbell*, praying to have a life-rent out of that estate, she states the rental to be nearly £1400 per annum. Even supposing this to be an exaggeration, yet I think we must infer from all the evidence that it was a property of no inconsiderable value. Now, the same evidence which would have shewn the Appellant's father to be entitled to the *Breadalbane* estates must also have shewn him to be entitled to *Glenfalloch*. His title, if any, to that property, accrued on the death of his father, in March, 1823. At that time, *Eliza Maria* was alive, and was universally received as the widow of his uncle *James*. *William John Lambe Campbell* was alive, and no doubt then, and for many years afterwards, there were many persons living who might have thrown light on the question; but yet the Appellant's father never asserted any title to *Glenfalloch*, though, if the case which the

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Appellant now makes, is well founded, his father knew that *William John Lambe Campbell*, who was in possession of it, was wrongfully holding that which belonged to him. It could never enter into the mind of *William John Lambe Campbell*, or of the Respondent, that there was any necessity for preserving evidence of their right to what they had been allowed to enjoy without molestation from the year 1812. The Appellant's father lived in great intimacy with *William John Lambe Campbell*, but he never gave him to understand that there was any doubt as to his legitimacy. He kept his evidence on this subject, if he had any, a secret, which avowedly he never meant to bring forward till some distant day, when all means of meeting or contradicting it would probably be gone. I have thought it right to advert to this circumstance, as adding to the other circumstance on which I rest my judgment. It is to the last degree important that Courts of justice should look with the utmost suspicion on the conduct of parties who intentionally keep secret matters at a time when they might be explained, in order to divulge them only when lapse of years may have made contradiction or explanation impossible.

It is only necessary to add, that I concur with my noble and learned friend in thinking that the interlocutor of the Court of Session ought to be affirmed.

LORD WESTBURY:—

My Lords, by far the greater part of the observations which I had intended to submit to your Lordships have been rendered wholly superfluous by the elaborate opinions which you have already heard. But as this case is one of great importance, I am unwilling to dismiss it with a silent vote. And I shall try to prove that I have attended to the Appellant's case by some remarks on the principal questions of law, and the principal subjects of contention that were urged by his learned counsel at the bar. For, in truth, this is not quite a question simply of fact; it is a case rather where the facts are not disputed materially on either side, but certain principles have been advanced by the Appellant as legal grounds for escaping from those conclusions which the facts render almost irresistible.

The Appellant's counsel began by complaining of the statement

of the Scottish law of marriage contained in the opinions of the learned Judges. I think that complaint was without foundation. It is not pretended by any of the learned Judges that marriage is constituted by cohabitation with habit and repute; but they one and all, I think, treat the evidence upon that subject as evidence to prove that which alone constitutes marriage, namely, the consent of the parties. Exception may possibly be taken to some few words occurring in one of the judgments which represents cohabitation with habit and repute as a mode of contracting marriage. Perhaps it may not be strictly correct to say that it is a mode of contracting marriage. It is rather a mode of making manifest to the world that tacit consent which the law will infer to have been already interchanged. If I were to express what I collect from the different opinions on the subject I should rather be inclined to express the rule in the following language: that cohabitation as husband and wife is a manifestation of the parties having consented to contract that relation *inter se*. It is a holding forth to the world by the manner of daily life, by conduct, demeanour, and habit, that the man and woman who live together have agreed to take each other in marriage, and to stand in the mutual relation of husband and wife; and when credit is given by those among whom they live, by their relatives, neighbours, friends, and acquaintances, to these representations and this continued conduct, then habit and repute arise and attend upon the cohabitation. The parties are holden and reputed to be husband and wife; and the law of *Scotland* accepts this combination of circumstances as evidence that consent to marry has been lawfully interchanged. Probably, therefore, in the correct expression of the law, it would be more proper to say that cohabitation with habit and repute is a mode of proving the fact of marriage rather a mode of contracting marriage.

If, therefore, this is a mode in which the consent necessary to create marriage may be manifested and proved, the question is, whether these parties, *James Campbell* and *Eliza Blanchard*, were free to contract that relation, and to prove it in the manner explained.

Now, there can be no possible doubt that, after the death of *Ludlow*, in 1784, *James Campbell* and *Eliza Blanchard* were free by

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law to intermarry. The Act of 1600 (1) has always been taken to apply only to cases where the husband and wife have, by reason of adultery, been, by judicial sentence of a proper Court, divorced from each other. The parties therefore in the present case were unquestionably free to intermarry.

But the Appellant objects that cohabitation which began when the parties were incapable of contracting marriage, and which was continued without change, is ineffectual to form the basis of the conclusion that consent to marry was interchanged after the impediment to marriage had been removed. That would be a very important rule if it were proved to be well founded; but I am unable to find any principle to justify the introduction of such a rule; and, what is more material to the purpose, I am unable to find any case, or any book of authority, in which that principle has been either followed out into a decision or has been laid down as a rule of Scotch law. It appears to be almost entirely derived by the Appellant from what I conceive to be a misapprehension of certain words found in the judgments delivered in *Cunningham* v. *Cunningham* and *Lapsley* v. *Grierson;* or, rather (if I may venture to say so), from a misapprehension of part of the marginal note to one of those cases (2). There is nothing to warrant the proposition that the subsequent conduct of the parties shall be rendered ineffectual to prove marriage by reason of the existence, at a previous period, of some bar to the interchange of consent. It would be very unfortunate if it were so. Marriage may be contracted between parties in a foreign land, where certain observances are required which, from ignorance or mistake, may not have been fulfilled. The parties having cohabited on the strength of an imperfect celebration, may afterwards come to *Scotland* and reside there for years, continuing the same course of life. It would, indeed, be a very sad thing if such a course of conduct, lasting, perhaps, for twenty or thirty years, were insufficient to warrant the conclusion of marriage.

There is no foundation for the argument that the matrimonial consent must of necessity be referred to the commencement of the cohabitation, nor any warrant for the Appellant's ingenious argument that, as the consent interchanged must be referred to some

(1) Chap. 20. (2) See *supra*, p. 185.

particular period, which he insisted was at the commencement of the cohabitation, and therefore insufficient, the cohabitation, which continued afterwards without interruption, would warrant no other conclusion than that which would be warranted by the consent interchanged at a time when it was insufficient. I should undoubtedly oppose to that another, and, I think, a sounder rule and principle of law, namely, that you must infer the consent to have been given at the first moment when you find the parties able to enter into the contract. The conclusion, therefore, that I derive, and which, unquestionably, is consistent with the language of the cases which have been referred to, is, that the consent between these parties was given, and that the marriage, therefore, in theory of law, took place, at the time when, by the death of the first husband, they became competent to enter into the contract.

Now, there is nothing in the language of Lord *Eldon* that interferes with that conclusion; on the contrary, when the words used in this House by that noble and learned Lord are considered, they will be found to be necessarily pregnant with the inference that cohabitation, notoriously illicit, does not interfere with the proof of marriage derived from the continuance of the cohabitation if the subsequent cohabitation became as notoriously licit, that is, if the subsequent cohabitation as husband and wife was accepted, reputed, and credited, as being such, just as effectually and as extensively as the former cohabitation was regarded as illicit. The words of Lord *Eldon*, in which, I think, this conclusion is necessarily involved, are these: He says: "Where it was first" (that is, where the cohabitation was first) "notoriously illicit, and where a change in the character of the connection must be operated" (that is, in order to bring out the result of marriage), "and when they found the means employed for that purpose to be such as left half the world in doubt—the servants, the relations—one half thinking one way, the other half the other—at what time, in what circle, could it be said that there was such a habit and repute as raised the presumption that the parties had mutually consented to be husband and wife?" And Lord *Redesdale*, following out the same train of observations, rests his judgment on the fact that there was not, in that case, sufficient habit and

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repute; for if six people were called to affirm that they believed them to be husband and wife, there were other six who might also be called to affirm that they believed the former illicit connection to be still continuing. It is, therefore, palpable that Lord *Redesdale* and Lord *Eldon* both considered that this connection, though in its origin illicit, might have become a connection attended with a different reputation, and which, therefore, would have been sufficient evidence of the fact of marriage.

And the same thing is involved in the other case of *Lapsley* v. *Grierson*, for in that case it is perfectly clear that the parties began their cohabitation by living in adultery; but if it had been proved to the satisfaction of this House that that cohabitation was continued after they knew that the first husband was dead, and if continuing after that event it had attracted to it the general estimation and belief of the parties having assumed the character of husband and wife when they were free and competent to do so, then it is clear that the noble and learned Lord would have arrived at a contrary conclusion to the judgment in that case. Therefore, in the absence of all authority to lead your Lordships to the opposite conclusion, I venture to think that you are fully justified in holding that there is no legal foundation (and certainly there is no moral foundation) to justify the argument that because two persons begin to cohabit when they are not at liberty to marry, and the cohabitation continues afterwards and is attended with a different repute, that cohabitation, with habit and repute, shall not avail in *Scotland* to make them married persons in the eye of the law.

There are one or two other points which I will advert to very shortly. The Appellant relied upon the letter of 1807, and drew from it these conclusions:—First: he said it is plain, from that letter, giving credit to the fact which it states, of a regular ceremony of marriage, that the matrimonial consent between the parties was interchanged at that time. Further, the Appellant said it is impossible to believe, or to infer, that any other matrimonial consent had been interchanged between the parties, for it would have been unnecessary, seeing that they had resorted to that ceremony. But, my Lords, I think it plain, particularly after the observations of my noble and learned friend on my

right (1), to which I listened with much pleasure, that that mode of regarding the letter is not consistent either with law, or reason, or common sense. Giving full credit to the letter, which I hold to be no evidence whatever of the fact, but taking the fact to be as stated in the letter, it is plain that the only thing which you can derive from the fact of that ceremony having been performed is, that the parties were very anxious to attract to themselves the estimation of standing in the relation of married parties, and for the sake of gaining that advantage they went through the ceremony, although they must both of them have been perfectly well assured that that ceremony was insufficient to constitute a marriage. What moral conclusion, therefore, can you derive from that? This only, that they were most anxious to have the character of being husband and wife. How far, therefore, does that operate upon the conclusion derived from their subsequent conduct? Why it aids the inference that the subsequent cohabitation, when they became free to marry, was a cohabitation that necessarily involved that consent to become husband and wife, which it is plain that they desired to become, even at that time, when there was a bar to their contracting a marriage.

These, my Lords, were the principal topics of the argument. The Appellant was bound to admit what has been demonstrated by the Lord Ordinary, and again to-day by my noble and learned friend, that the conduct of the parties, from 1793 to 1806, was abundantly sufficient to prove the fact of marriage. To that must be superadded what undoubtedly produces in this case the great moral conviction that that judgment is the right one, namely, that this question might have been raised between the ancestors of the present parties in the year 1812. At that time the father of the Respondent plainly asserted that he was the lawful son of *James Campbell*, an allegation which involved of necessity the fact that the father and mother of *William James Lambe Campbell* had lived in lawful marriage. *William James Lambe Campbell* accordingly was accepted and taken, in a solemn proceeding, as being the heir of *Glenfalloch*, by reason of his being the legitimate eldest son of his father, *James Campbell*. It is impossible to imagine any proceeding (especially when so near the time of the death of *James*

(1) Lord *Cranworth*.

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*Campbell*, and whilst his widow was living), more conclusive of the fact that *James Campbell* and *Eliza Blanchard* were universally recognised, accepted, and taken, as husband and wife; and that there was no ground for disputing the legitimacy of their son. That title has been followed by possession and enjoyment for more than fifty years. It might have been disputed again in 1850, but it was not; and I trust, therefore, that your Lordships, and that all who attend to this case, will be satisfied that we have arrived at a conclusion consistent with the actual law of *Scotland*, and that all reason and sense dictate your coming to the conclusion that this marriage ought not, upon any ground, to be regarded as open to dispute, and consequently that the Respondent is entitled to retain the judgment which he has obtained.

My Lords, I concur entirely in the motion of my noble and learned friend.

LORD COLONSAY:—

My Lords, I am in the position of having been one of the Judges before whom this case was argued in the Court below. It was my duty there to express my opinion on the result of the evidence and the arguments which were brought before us. The case underwent very full consideration in that Court; and I then gave my judgment very fully, both upon the facts and upon the law, which judgment is printed in the papers now upon your Lordships' table (1). I have since had the benefit of hearing the very able argument which has been addressed to your Lordships by the learned counsel in this case, and reconsidering the whole case, both on the evidence and on the law; and I see, and have heard, no reason for altering the judgment which I then delivered, and which led me to the same conclusion, in fact and in law, at which your Lordships have arrived in the judgments which you have now delivered. I therefore think it would be improper for me to detain your Lordships by repeating that which is already in the possession of the parties, and which lies in a printed form on your Lordships' table.

Mr. *Anderson*:—My Lord, before your Lordship puts the ques-

(1) See also 3rd Ser. vol. iv. p. 943.

tion to the House, may I be allowed to ask your Lordships to indulge me for a moment on the question of costs? Considering the importance of the stake here, and that there was a difference of opinion among the Judges below, we could scarcely avoid coming to your Lordships' House.

LORD WESTBURY:—My Lords, I trust your Lordships will not allow this practice of raising discussions on the question of costs to be introduced. Nothing can be more mischievous than to have a separate argument on the subject of costs. Your Lordships, according to my experience, have always deprecated that practice, and I trust you will not think this case an exception to the general rule.

THE LORD CHANCELLOR:—Your Lordships have not expressed any opinion with regard to costs in this case. What I was going to propose to the House was, that the appeal should be dismissed with costs in the usual way. I see no reason for any deviation from the general rule in that respect.

*Interlocutors affirmed, and appeal dismissed with costs.*

Solicitors for the Appellant: *Martin & Leslie.*
Solicitors for the Respondent: *Loch & Maclaurin.*

1867 July 30.

MARIA THERESA LONGWORTH, or YELVERTON . . . . . } Appellant;

The Hon. MAJOR YELVERTON . . . . . Respondent.

*Reference to Oath of Party.*

6 App Cas 498,572

In *Scotland* there may be a reference to oath at any time between the closing of the record and the extracting of the decree, although every other mode of proof has been previously tried and has failed.

Even after a judgment of the House of Lords on appeal a reference to oath is competent, and continues so till extract.

Such reference, however, is matter of judicial discretion, and not to be permitted where the *status*, the rights, or the interests of third parties may be prejudiced or affected.

The true principle is, to settle the immediate question between the parties litigant, and to go no further.

A reference to oath ought not to be permitted where the response may involve an admission of criminality; for no one is bound to swear *in suam turpitudinem.*

As to whether a reference to oath is competent in a declarator of marriage, see the opinions of the Lord Chancellor, *infra*, p. 220; of Lord *Cranworth*, *infra*, p. 226; and of Lord *Colonsay*, *infra*, p. 227.

*Practice.*

At the close of the Respondent's argument the Appellant, who had opened her case in person, was told that the House would hear her Counsel in reply. But if she began she must finish. The House would not allow her to break off and then hear her Counsel.

On the 7th of August, 1858, *Maria Theresa Longworth*, or *Yelverton* (who, for the sake of brevity and distinctness, will be hereafter, in this report, called *Maria Theresa* only ~~(1)~~), commenced her suit in the Court of Session, praying a declaration that she was the lawful wife of Major *Yelverton*.

On the 8th of June, 1859, Major *Yelverton* brought his cross action in the same tribunal against *Maria Theresa*, praying a de-

~~(1) Her *status* is not yet ascertained, notwithstanding many solemn judgments. The Irish Courts, having direct jurisdiction by reason of domicil, may still be resorted to. But whatever happens she must always be *Maria Theresa*. To call her "the Appellant" would sometimes puzzle; for in the original appeal of which the present is but an incident she was Respondent.~~

claration that he was "free of any marriage with her, and that she should be put to silence."

The Court of Session (First Division) ultimately pronounced judgment in favour of *Maria Theresa* with costs. In other words, they declared that she "was the lawful wife of Major *Yelverton*;" —the Lord President, now Lord *Colonsay*, dissenting.

Against this decision Major *Yelverton* appealed to the House of Lords.

On the 28th of July, 1864, their Lordships reversed the decision appealed from, and remitted the cause back to the Court below, to do therein as should be just and consistent with the judgment of the House (1).

Before the question was put from the woolsack the counsel of *Maria Theresa* asked and submitted that the judgment of the House should leave it open to her, if she should be so advised, to refer the points at issue to the oath of Major *Yelverton*. The House, however, did not accede to this application (2).

On the 19th of November, 1864, Major *Yelverton* presented his petition to the Court below praying that the judgment of the House should be applied.

On the 10th of December, 1864, the counsel of *Maria Theresa* tendered a reference of the whole cause to the oath of Major *Yelverton*.

After due consideration of printed and oral argument as to the competency and the propriety of this application, the Court below ultimately, on the 10th of March, 1865, refused to allow the reference proposed; and it was against this refusal that the present appeal was tendered.

On the 27th of June, 1867, the case stood in the paper for hearing; the Law Peers present being the Lord Chancellor, Lord *Cranworth*, Lord *Westbury*, and Lord *Colonsay*.

THE LORD CHANCELLOR, addressing *Maria Theresa*, said:—I thought you were to appear by counsel.

*Maria Theresa*:—My counsel is not here.

THE LORD CHANCELLOR:—If he is likely to come, we should be

(1) 4 Macq. 747. (2) 4 Macq. 746 and 911.

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sorry to deprive you of the benefit of counsel. But you perhaps prefer addressing the House yourself.

*Maria Theresa*:—Yes, my Lords.

The address of *Maria Theresa* went over several days.

The *Attorney-General* (1) and Mr. *Anderson*, Q.C., were heard on the other side.

At the close of their argument it appeared that the counsel of *Maria Theresa*, Mr. *Campbell Smith*, had arrived from *Scotland*.

It was, therefore, intimated to *Maria Theresa* that her counsel might reply, Major *Yelverton's* counsel not objecting; and the Lord Chancellor (after a reference to the other Law Peers) observing:—If you are unable to go through the reply yourself, we think, under the circumstances of this exceptional case, that we may hear your counsel. But if you begin you must finish. We cannot allow you to break off and then hear your counsel.

*Maria Theresa*:—He is not prepared to reply.

THE LORD CHANCELLOR:—Then you must go on yourself.

At the close of *Maria Theresa's* argument the Lord Chancellor said the House would take time to consider of its judgment.

On the 30th of July the Law Peers delivered the following opinions, which more than exhaust the authorities and arguments adduced at the Bar.

THE LORD CHANCELLOR (2):—

My Lords, on the 19th of November, 1864, Major *Yelverton* having presented the usual petition to the Court of Session to apply the judgment pronounced by your Lordships on the former appeal, the present Appellant, *Maria Theresa*, lodged a note praying the Court to supersede consideration of the Major's petition, and craving leave to put in a condescendence of *res noviter veniens ad notitiam*. The proposed condescendence alleged

(1) Sir *John Rolt*. (2) Lord *Chelmsford*.

that since the judgment of this House (1) "she had been informed that Major *Yelverton*, when on a visit to his deceased brother, the Honourable *Frederick Yelverton*, in the presence of *Sarah Mallins*, who was at the time attending the brother as a sick nurse, acknowledged and admitted that he had married *Maria Theresa* in *Scotland*, and renewed his marriage vows in *Ireland;* that *Sarah Mallins* died in the *Meath Hospital;* and that when she was in a dying state, and attended by the Reverend *Edward George Campbell*, she told him what had passed between the two brothers, and he communicated it to *Maria Theresa*."

The Court below, after argument, pronounced an interlocutor on the 10th of December, 1864, by which they refused the desire of *Maria Theresa's* note, and applied the judgment of this House.

After this interlocutor a minute of reference to oath was tendered on behalf of *Maria Theresa*, which minute was in the following terms: "The Pursuer in the said declarator of marriage hereby refers the whole cause to the oath of the Defender, the said *William Charles Yelverton;*" and a Petition was presented praying the Court to sustain the minute of reference to oath.

The First Division, on the 10th of March, 1865, pronounced the interlocutor now appealed from, refusing to sustain the proposed reference to Major *Yelverton's* oath.

Now, my Lords, it must be taken as a settled rule of law in *Scotland*, that there may be a reference to the oath of a party at any time between the closing of the record and the extracting of the decree, although every other mode of proof has been previously tried and has failed. And however strange it may appear to those who are unaccustomed to the practice of the *Scotch* Courts, that a party having attempted to prove a case by testimony, and having failed, should be allowed, almost at the last moment, even after final judgment, to resort to a new method of proceeding of which he had his choice from the first, yet, such being the law, we are bound not to question but to administer it.

The reason why this reference to oath is allowed at so late a stage of the proceeding seems to be, that until judgment is extracted the cause is still in Court. This being so, there can be no difference in principle between the case where a judgment is

(1) On the 28th of July, 1864.

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final in the *Scotch* Courts because not appealed from, and the case of a final judgment by this House, which equally requires extract before execution can issue.

But it was contended on the part of Major *Yelverton* that a reference to oath is inadmissible in a case of declarator of marriage, and especially where, as in this case, the interests of third persons are concerned.

With respect to the competency of a reference to oath in a declarator of marriage, I am strongly of opinion that, whatever may have been the practice formerly, since the statute 11 Geo. 4 & 1 Will. 4, c. 69, such a proceeding is incompetent. The 33rd section of this Act enacts, "that all actions of declarator of marriage," and other enumerated consistorial actions, "shall be competent to be brought and insisted upon only before the Court of Session." And, by the 36th section, "no decree or judgment in favour of the Pursuer shall be pronounced in any of the consistorial actions thereinbefore enumerated, until the grounds of action shall be substantiated by sufficient evidence."

In the case of *Muirhead* v. *Muirhead* (1), which was an action of separation *à mensâ et thoro*, brought by a wife on the ground of ill-usage, the husband admitted on the record conduct which, in the opinion of the Lord Ordinary, was sufficient to justify the conclusions of the action. Upon the case coming before the Court upon a verbal report by the Lord Ordinary for instructions, Lord *Mackenzie* said, and the rest of the Court concurred, "I read the words 'sufficient evidence' as meaning sufficient evidence independent of the admissions of the party. I think the Act meant entirely to exclude admissions, and require extrinsic evidence." Now it is quite clear that an admission upon the record can never be regarded as evidence; but the Court could not have meant to say, that if proof had been led in the case, admissions proved to have been made by the husband that he had ill-used his wife would not have been evidence, and might not have been "sufficient evidence." But an oath upon reference is not evidence at all. As my noble and learned friend, Lord *Colonsay*, said in this case in the Court of Session: "A reference to oath is not what we are accustomed to regard as testimony proper. It is neither parol nor

(1) 8 Dunlop, 786.

documentary evidence. An oath taken upon a reference is not the examination of a witness, it is what is technically called oath of party." And again, "It is not to be taken in connection with documentary or parol evidence that has been adduced. It may be hostile to all other evidence. It is to be judged by itself, and the question for the Court to determine, upon an oath emitted under a reference, is not what upon the aspect of the whole cause appears to be the truth of the matter, but it is, what has the party sworn?" As a party by referring to the oath of his adversary renounces all other species of proof, and as the "oath emitted under a reference" is not evidence, a decree pronounced in a declarator of marriage founded upon this mode of proceeding, would be a violation of the express words of the statute, as the grounds of the action would not have been substantiated by "sufficient evidence." A reference to oath, therefore, cannot, in my opinion, be competent in this description of action.

But supposing a reference to oath to be admissible in an action of declarator of marriage, it ought not to be permitted in any case where the rights and interests of third persons would be prejudiced by a decree founded upon an oath affirmative of the reference. That would be the necessary consequence of such a decree in the present case.

It appears upon the record that, after the time of his alleged marriage with *Maria Theresa*, Major *Yelverton* was married in June, 1858, in *Edinburgh*, to Mrs. *Forbes*, the widow of Professor *Forbes*. A decree, therefore, establishing the validity of the marriage of *Maria Theresa* and Major *Yelverton*, must necessarily deprive Mrs. *Forbes* of the *status* which she acquired by her marriage with Major *Yelverton*. And this consequence would be the result of what is called a "transaction" or "judicial contract" between persons engaged in a litigation to which she is no party.

It was said, however, by *Maria Theresa*, that the reference to oath could not prejudice Mrs. *Forbes*, because the oath affects the parties to the transaction only; and that no judgment on it could be *res judicata* against her, being *res inter alios acta*. It is quite true that the oath of reference would not affect third persons; but there may be cases in which it must, of necessity, prejudice, if not conclude, the rights of strangers to the proceeding. In such cases

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the reference to oath is not admissible, for, as was said by Lord *Moncreiff*, in *Adam* v. *Maclachlan* (1), "the general case of reference to the oath of party is, where the party referring and the party referred to stand with opposed interests on the matter referred, and where no other interest is involved."

Upon this point I may borrow the language of Lord *Stowell* in *Dalrymple* v. *Dalrymple* (2), where he says :—

> The lady of the second marriage is not here made a party to the suit. She might have been so in point of form if she had chosen to intervene. In substance she is ; for her marriage is distinctly pleaded and proved, and is as much, therefore, under the eye, and under the attention, and under the protection of the Court as if she were formally a party to the question respecting the validity of this marriage, which is, in effect, to decide upon the validity of her own. For I take it to be a position beyond the reach of all argument and contradiction, that if the first marriage be legally good, the second marriage must be legally bad."

If upon the oath of reference in this case a decree were made establishing the marriage of *Maria Theresa* and Major *Yelverton*, there can be no doubt that it would be binding upon Mrs. *Forbes*. It would be a judgment *in rem*, which has been defined to be "an adjudication pronounced upon the *status* of some particular subject matter by a tribunal having competent authority for that purpose" (3) ; and the characteristic quality of a judgment *in rem* is, that it furnishes in general conclusive proof of the facts adjudicated, and is binding on all persons whomsoever. If, therefore, the reference to oath were to be admitted in this case, Mrs. *Forbes* might be deprived of her *status* as a wife by a decree made behind her back, and which she would never afterwards be able to question.

But there is a further objection to the reference to oath in this case, that the answer to it in the affirmative (an answer which *Maria Theresa* must be taken by her reference to expect to receive) necessarily involves an admission by Major *Yelverton* of criminality. If he were to admit the alleged marriage between himself and *Maria Theresa*, he must confess that he has been guilty of bigamy. And this necessary effect of an affirmative answer plainly appears upon the record, where his marriage with Mrs. *Forbes*, at a date subsequent to the time of his alleged mar-

(1) 9 Dunlop, 560. (2) 2 Con. 58.
(3) 2 Smith's Leading Cases, 439.

riage with *Maria Theresa*, is pleaded, *Maria Theresa* says, in her printed case :—

There are cases in which a reference to oath was refused on the ground that a party should not be compelled to swear *in suam turpitudinem*. But all these cases were prior in date to the Act 1 Will. 4, c. 37, the 9th section of which abolished infamy as a ground of incompetency of a witness. The Act 15 & 16 Vict. c. 27, further removes all impediments to the admissibility of the evidence of persons convicted of crime. In the present state of the law of evidence it is obvious that in the cases of *Rogers* (1), *McEacharn* (2), and *Thomson* (3), the parties who were not obliged to swear *in suam turpitudinem* would now be competent and compellable witnesses in similar cases, with the option of declining to answer any question that might criminate themselves.

Such is the argument of *Maria Theresa* upon this point, which leaves out of view one very important consideration, namely, that although the party in a case of reference to oath may refuse to answer if thereby he would criminate himself, yet the effect is, that he is taken to have confessed the facts which are referred to his oath, and exactly the same benefit results to the party making the reference as if he had obtained an affirmative answer. In the present case, therefore, Major *Yelverton*, if he answered affirmatively, would have admitted himself to have been guilty of bigamy, or if he had refused to answer, Mrs. *Forbes* would have been conclusively deprived of all the rights which she had acquired by her marriage with Major *Yelverton*.

There can be no doubt that a reference to oath is not the absolute right of a party, but that it is in the equitable discretion of the Court to admit or to refuse. Lord *Moncreiff*, in the case of *Pattinson* v. *Robertson* (4), said: "I could not perhaps go quite so far as Lord *Cringletie* did in the case of *Ritchie* (5), though in that approved by Lord Chancellor *Lyndhurst*, that the reference to oath is in our law a mere appeal to the equitable discretion of the Court. But I agree so far, that though regarding it as a legal right to appeal by motion to the Court to that mode of proof as an ultimate *remedium*, it may still be in the discretion of the Court to allow it under the circumstances of any particular case."

Now, assuming that there may be a reference to oath in an

(1) 2 Shaw, 444.
(2) 3 Ibid. 9.
(3) 7 Shaw, 32.
(4) 9 Dun. 226.
(5) 3 Wils. & Sh. 484.

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action of declarator of marriage, yet where, as in this case, the interests of a third person are affected, and may be irrevocably bound, and where the effect of the reference may be either to compel the confession of a crime, or to conclude the rights of another by a refusal to answer, I think that the Court of Session were perfectly justified, in the exercise of a sound judicial discretion, in refusing to sustain the reference to oath in this case, and that their interlocutors ought to be affirmed.

LORD CRANWORTH:—

My noble and learned friend on the woolsack having had the goodness to communicate to me an outline of the opinion which he was about to deliver in moving the judgment of your Lordships' House, and concurring, as I do, with my noble and learned friend in the whole of that opinion, I do not think that I am called on to trouble your Lordships with many—I might, perhaps, say with any—observations. I wish it, however, to be understood that, though my learned and noble friend has referred to the statute of 11 Geo. 4 & 1 Will. 4, transferring the consistorial jurisdiction in *Scotland* to the Court of Session, as being, in some respects, the foundation of his judgment, and although it may be very truly said that that statute confirms the view which may be otherwise taken on the subject, I must confess that, independently of that statute, I do not believe that it can be the law of *Scotland* that, in such a case as this, there should be a reference to oath. The principle on which that reference is allowed is so clearly stated by Lord *Moncreiff*, in the passage quoted by my noble and learned friend, that I should be willing to rest my opinion on that authority, even if the statute had not existed. "The general case," he says, "of reference to the oath of party is where the party referring and the party referred to stand with opposed interests on the matter referred, and where no other interest is involved" (1). When that is the case, there is, perhaps, no absurdity (so to say), even at the very last moment of time, in allowing a reference to the oath of the party. But the moment you get a case in which the interests of third parties are involved, it appears to me to be a pro-

(1) *Adam* v. *Maclachlan*, 9 Dun. 578.

position that cannot be sustained, even upon the authorities which have been referred to, that such can be the law of *Scotland*, or of any civilized country. There is no doubt that there have been consistorial cases in which a reference to oath has been admitted; but there has been no such case in which the doctrine has been affirmed by this House; and I cannot admit that it could have been properly recognised and acted upon in those cases, if they involved (as I believe some of them did) the interests of third persons, as is certainly the case here. Even if there had been no marriage with Mrs. *Forbes*, I very much doubt whether, in any case of a question of *status*, there can be such a reference to oath, because the interests of third parties are necessarily involved. When the question is, whether a person is or is not a married woman, the interests of all the creditors who have trusted her must be involved. Therefore, I think, general principle goes far to exclude it in all cases. But even if that were not so, the last observation of my noble and learned friend seemed to me to be perfectly satisfactory—namely, that it is clear on all the authorities that such a reference is not the absolute right of any party, but only a right which the Court, in its discretion, may or may not allow; and it would have been a highly-improper exercise of its discretion to have allowed it in this case.

LORD WESTBURY:—

My Lords, it is not my intention to give any vote on this question, as I was compelled to be absent during part of the argument. But I had the advantage of hearing the whole of *Maria Theresa's* address; and I am obliged to say that the impression which I then received was that there was no ground on which this judgment of the Court below could be questioned.

LORD COLONSAY:—

My Lords, after the expressions of opinion which have now been given, this case is practically decided. Whatever view I may have of it—whatever view I may express, if I express any opinion at all—the judgment must be the same. But, my Lords, in a case of this kind, which I view as one of vast importance to the law of

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*Scotland*, I think it incumbent on me to express the opinion that I entertain.

When the case was presented to the Court below, the novelty of the proposition of a reference to oath in such a case appeared to me so great that I thought it right, after having heard a full oral argument on the subject, to suggest that the parties should again lay before the Court the argument in a written form, in order that it might be deliberately considered; and it was after having had the benefit of those two discussions (as I may call them) upon it that I arrived at the conclusion that the proposal of the Appellant, to refer this matter to the oath of the Defender, was one which, under the circumstances, could not be admitted. Since then the question has been fully argued at the bar of this House, and I deemed it my duty to revise and reconsider the opinion which I had formed, feeling that, perhaps, the Appellant had not had all the benefit she might have derived had she selected a different mode of conducting her case.

Having again applied my mind to the case, I have failed to find any ground for altering the judgment that has been pronounced in the Court below.

It appears to me to be a clear proposition in the law of *Scotland* that in most cases (I will not, after what has been expressed, say in all cases, but in most cases) a party may apply to have a reference to the oath of the adversary after the case has been decided. Whether that is, or ought to be, the rule in cases of declarator of marriage, may be a grave question. But in a case such as this, and, indeed, in all cases, where reference to the oath of a party is proposed, there is a discretionary power in the Court to allow the reference, or not to allow it. The very form of the proceeding implies that; because when it is proposed to refer to the oaths of the adversary the proposal is submitted to the Court, and it requires the approval of the Court before the adversary can be put to oath. Therefore, the Court is forced to consider the matter on the proposition which is submitted to it before it can give its approval. And that approval is a matter not limited to the mere form in which the reference is presented—it involves also a consideration of the circumstances of the case and the propriety of allowing the reference. That is clear from all the authorities, and

from some of the cases which have been referred to by my noble and learned friend on the woolsack.

That being so, the question which we had to consider was, whether this was a case in which such a reference to oath should be allowed. There, again, several questions were raised. First, as to the competency of reference under such circumstances; and, secondly, as to the propriety of the Court exercising its discretion in the way of allowing or refusing the reference, even supposing it to be competent.

Upon the question of the competency of the reference I do not think it is necessary for me to express any decided opinion. There were certain objections taken to the competency of the reference which I thought at the time, and still think, to be unfounded. In the first place, it was objected that this reference could not be made, because there had been a final judgment of the House of Lords in the cause. I was unable to bring my mind to that conclusion. I was unable to see any logical distinction between the power of the Court below, after a final judgment of this House, affirming the judgment of the Court below, and the power of the Court below, if its own judgment had been allowed to remain unappealed against; for the rule is, that at any time before extract reference is good. When a party has lost his cause in the Court below and has appealed to this House, and this House has affirmed the judgment, I can conceive a very good reason, in policy, why, in such circumstances, a reference to oath should not be allowed; but when a party has gained the cause in the Court below, and the adversary drags that party here and gets an alteration of the judgment, why should the party be precluded in that case from referring to oath. She could not have done it in the Court below in the circumstances in which she then was, for she had gained her case. Therefore, I think it would be a hazardous doctrine, and one which I could not acquiesce in, to hold that merely because there had been a judgment of the House of Lords in the case—therefore a reference to oath was incompetent.

Another point was raised, as to which I have more difficulty, as to whether a party can be allowed to refer to oath in a suit of this kind, looking at the terms of the statute of 11 Geo. 4 & 1 Will. 4, c. 29, I did not think it necessary in the Court below to pronounce any

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judgment on that point, because I saw sufficient grounds without it to arrive at a conclusion upon the case. And though I see great force in the argument, I would rather now not commit myself to any opinion on the point. There is much to be said in favour of the view that the statute has shut out such references in cases of declarator of marriage and other consistorial causes. But that depends on the meaning that is to be attached to the word "evidence" in that statute, and to the meaning that is to be attached to the word "admission" in Lord *Mackenzie's* judgment (1). There is great room for holding that in Lord *Mackenzie's* judgment, at least, the word "admission" meant an admission by the party upon the record; that is to say, that the party merely putting on the record admissions, is not enough to entitle the Court to proceed to pronounce judgment in a declarator of marriage. That is not evidence given under the sanction of an oath. According to the course of procedure in the Courts in *Scotland*, where a matter is admitted the opposite party does not require to adduce evidence to prove it. And we know that in consistorial cases of various kinds it would be perilous to the interests of society to proceed upon admissions made by the parties. There was a case under our consideration in this House which, I think, affords an illustration of what might happen if such matters were admitted. I mean the case of *Cunningham* v. *Cunningham* (2). In that case, where a party had, during the life of a woman, and at her death, shewn by his conduct, and where the whole circumstances of the case, as judged in this House, had shewn, that there had been no marriage whatever between the parties; yet, after an interval of time, when it became his interest or inclination to change the state of affairs, he then chose falsely (as the judgment of the House found) to allege a marriage. Now we see what peril would attach to the interests of third parties if a reference to oath were admitted in such cases.

Another ground was contended for, namely, that by requiring the party to swear in this case he was required to swear *in suam turpitudinem*. That is, I think, a graver question. I think there is much in it, as I stated in the Court below.

But when we come to the question, whether the Court is to

(1) *Muirhead* v. *Muirhead*, 8 Dun. 786. (2) 2 Dow. 483.

exercise the discretion that belongs to it, I confess that I see every principle against sustaining the reference, and no principle in favour of it. I think it is quite clear that such a rule as referring to the oath of a party after a case has been fully investigated is one which, if it exists in any system of jurisprudence at all, must be guarded with a discretionary power of the Court to prevent its being abused. That discretionary power exists with reference to the administration of this branch of the law in *Scotland*. And when we come to look to the principle on which reference to oath is admitted, I quite concur in the view that has been expressed by my noble and learned friend, that the true principle is to settle the immediate question between the two parties in contest, and to go no farther. Now, if the question in a suit between two parties be one which necessarily involves the interests of a third party, if it be of a kind that the settlement of the question between these two parties would, or might, greatly injure the interests of a third party, then I think it questionable, in the first place, whether such a reference to oath would be competent; but I also think it quite clear that any exercise of judicial discretion ought to go in the direction of preventing such risk of injury to a third party.

Upon these grounds, my Lords, I am quite clear that the judgment of the Court below ought to be affirmed. If, on hearing the argument, I had entertained any doubt on the question, or had come to a conclusion opposite to that to which I arrived in the Court below, I certainly should not have hesitated to concur, as I did in a former case in this House, in altering the judgment which I had pronounced in the Court below; but I see no reason to entertain any doubt whatever in this case.

*Interlocutors affirmed.*

Solicitors for the Appellant: *Simson & Wakeford.*
Solicitors for the Respondent: *Tippetts & Son.*

1867 July 30.

CARLTON AND HUDSON . . . . . APPELLANTS;
THOMPSON *et al* . . . . . RESPONDENTS.

*Vesting—Life-rent and Fee.*

12 Eq 109.
7 Ch 9.

The general rule is, that the fee vests *à morte testatoris*; whether given to individuals *nominatim*, or to a class.

The leaning of the law is towards vesting. Thus the postponement of the period of payment till the expiration of a life-rent does not suspend the vesting. That some members of a favoured class were unborn at the testator's death is no obstacle to the right vesting in each of them as soon as they respectively come into existence; although the amount of the benefit to each may not be then ascertainable.

The *jus crediti* is in the beneficiaries as a vested right, although the *jus dominii* may be in trustees.

Where a fee has vested, it passes to heirs and personal representatives, unless there be something in the language of the instrument, or in the nature of the subject, that requires a deviation.

*Jus Accrescendi.*

The doctrine of the Roman law as to *jus accrescendi* is subtle and obscure. It is but little used in *Scotland*. Where a fee is provided to a class, the question whether on the death of one of the class, his share shall go to the survivors or to his own representatives, is always a *questio voluntatis*.

It would seem that the omission of an express accrescing clause will go far to exclude accretion.

IN this case a testator directed that the residue of his property should be vested upon trust for his daughter in life-rent, and for her children in fee.

She had seven children, of whom two were born before the testator's death, and five after.

The Lord Ordinary (1) held, that the fee vested *à morte testatoris* in the children at their births respectively. This decision was adhered to by the Court of Session.

The Appellants contended that the vesting did not take place till the death of the life-rentrix, and then only in such of the children as survived her, namely, the Appellant, Mrs. *Carlton*, and her sister, Mrs. *Hudson*.

(1) Lord *Jerviswoode*.

Sir *Roundell Palmer*, and Mr. *Anderson*, Q.C., were of counsel for the Appellants.

The *Attorney-General* (1), the *Lord Advocate* (2), and Mr. *Neish*, appeared for the Respondents.

The case (3) was specially looked into by Lord *Colonsay;* the question, though one of construction, involving points of nicety. There were two distinct topics of investigation—the first as to *vesting*, the second as to *accretion*. All the relevant authorities were examined by his Lordship, who addressed the House as follows:—

LORD COLONSAY:—

My Lords, the late *Andrew Hunter*, a surgeon in the service of the *East India Company*, by a testamentary trust disposition and settlement, dated the 12th of January, 1808, conveyed, in the event of his death without lawful issue of his body, to trustees, all and sundry his whole means and estate, heritable and moveable.

The deed, after securing £10,000 for the purposes of the provisions in favour of the truster's spouse, and making certain other testamentary provisions, proceeds as follows:—

"And the residue of my said estate and effects, heritable and moveable, including the fee of the £10,000 set apart for answering the provisions to my said spouse, I direct and appoint to be vested in my said trustees for behoof of my daughter, Mrs. *Isabella Sarah Hunter*, alias *O'Reily*, in life-rent (exclusive of the *jus mariti* of her husband), and her children in fee; to be kept in trust by them till they in their discretion shall see proper to settle it in the most safe and secure manner on her and her children: And in the event of her decease without issue of her body, I hereby direct and appoint my said trustees to convey and make over the said residue of my said estate and effects, including as aforesaid, and remaining after payment of my said debts and legacies, to and in favour of my nieces, Mrs. *Anne Wood*, Mrs. *Grizel Charles*, Mrs. *Marion Mair*, *Margaret*, *Jane*, and *Agnes Hunters*, Mrs. *Janet Riddle*, Mrs. *Eleonora Sandilands*, *Isabella* and *Agnes Hunters*, equally among them; but in the event of their, or either or any of them, dying without lawful issue, the share of such niece dying without issue to go equally among my said other nieces and their issue; but burdened always with the sum of £3000 sterling to the said *John Tracy O'Reily*, which I had settled as a portion

(1) Sir *John Rolt*. (2) Mr. *Gordon*.
(3) See Court of Session Cases, 3rd Series, vol. iii. p. 514.

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on my said daughter in case of her marriage, or such part thereof as may be due at her death, and the lawful interest of the same from the first term of Whit-Sunday, or Martinmas, after her death, during the not payment; and also with the burden of an annuity of £200 sterling yearly to the said *John Tracy O'Reily* during his life, after the death of his said spouse; and with the further burden of the payment of a legacy of £500 sterling to Lieut. *John Hunter*, in the service of the *Honourable East India Company*, my nephew, in the event of the decease of my said daughter without issue, and to be payable at the first term of Whit-Sunday, or Martinmas, after her death, with the lawful interest thereof after the said term of payment during the not payment of the same."

The truster died on the 29th of March, 1811, without lawful issue. He was survived by his spouse, and also by Mrs. *O'Reily*, and her husband.

After the death of Mrs. *O'Reily*, the trustees raised the present process of multiplepoinding and exoneration for the purpose of obtaining a judicial determination of the rights of all parties claiming interest in the trust estate, and a judicial exoneration of their own actings as trustees. The several parties claiming an interest in the trust estate having lodged claims, a record was made up and closed, and the parties were heard upon the questions raised under that record.

The leading question which, if decided one way, would practically have disposed of the whole cause, was, whether, under the terms of the trust disposition and settlement those of the children of his daughter, Mrs. *O'Reily*, who pre-deceased her, had or had not a *vested* interest in the trust estate. On the part of Mrs. *Carlton* and Mrs. *Hudson*, who alone survived their mother, it was contended that no interest had vested in any of the children who pre-deceased their mother, the life-rentrix, and in that view they claimed the whole residue. On the part of the other claimants, as representing in various ways and to various effects the children who had pre-deceased their mother, it was contended that the vesting of the interest in those children was not suspended till their mother's death; that they had a vested interest during her life; and that such interest was transmissible and transmitted to their representatives by law or by will. If that question had been decided in favour of Mrs. *Carlton* and Mrs. *Hudson*, most, if not all, of the other claims and questions that have been raised would have been excluded; but the Lord Ordinary and the Inner

House decided it against them, and they have appealed. Other questions are involved in the appeal, but I shall first deal with the question of vesting.

When the question arises under a *mortis causâ* settlement, whether the benefit given is, or has become, a vested right, the intentions of the testator, in so far as they can be discovered or reasonably inferred from the deed taken as a whole, and from the circumstances, legitimately collected, under which the deed was made, should have effect given to them. It is *questio voluntatis.* That is the cardinal rule and guide. The task of discovering the testator's intentions is sometimes perplexing, and in such cases aid may, to some extent, be derived from the application of presumptions recognised in previous decisions.

The general rule of law as to bequests is, that the right of fee given vests *à morte testatoris.* That rule holds, although a right of life-rent is at the same time given to another, and although that is done through the instrumentality of a trust, and whether the fee be given to an individual *nominatim* or to a class. The postponement of the period of payment till the death of a life-rentrix does not suspend the vesting; nor does the interposition of the machinery of a trust for carrying into effect the intentions of the testator. Indeed, the creation of a trust is a very usual mode of securing the interest of a life-renter, where the right to the fee is nevertheless intended to vest in the person or class of persons for whom it is destined. Although the *jus dominii* may be in trustees, the *jus crediti* is in the beneficiaries as a vested right. At one time doubts were entertained as to the case where the settlement was by a trust deed to hold for a life-renter and successive persons as fiars; but the tendency of recent decisions in that class of cases, and, indeed, in almost all cases, has been in favour of the vesting of the fee *à morte testatoris,* unless the terms of the deed are such as to exclude that construction.

The case of *Forbes* v. *Luckie* (1) supplies authority on most of these points. Lord *Fullerton* was the Lord Ordinary in that case; and the Judges in the Inner House, while affirming his judgment, delivered their opinions fully. Lord *Corehouse* spoke very decidedly on the several points above referred to. Lord *Gillies* and Lord

(1) 16 Shaw, 374.

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*Mackenzie* added the weight of their great authority. In subsequent decisions the authority of that case has been fully recognised and given effect to. The circumstance that some of the members of the favoured class were unborn at the testator's death is no obstacle to the right vesting in each of them as soon as they respectively come into existence, although the amount of the benefit to accrue to each may not be then ascertainable. That is quite settled.

There may, however, be cases in which vesting is suspended. Thus, where the right is made conditional on a contingency personal to the legatee, such as marriage, or arrival at majority, events or dates uncertain, which may never have place, there is a presumption, though not insuperable, that a vesting or right to take was intended to be suspended until the occurrence of the contingency should be ascertained. So also an inference to that effect may be deduced from an express clause of substitution or survivorship applicable to the members *inter se* of a class to whom the fee is destined. These are the most usual indications of intention to suspend vesting. But neither of them occurs in the deed now under consideration. An inference of intention to suspend vesting may, in a particular case, be collected from the whole purpose and tenor of a deed. I shall presently consider whether the purpose and tenor of the present deed are or are not such as fairly to support that inference. It has been contended that where, in addition to postponement of the period of payment during the life of a life-renter, there is a substitution, or, as it is sometimes called, a destination over, in favour of parties other than the fiars first named, there is a presumption that the vesting also was intended to be postponed till the death of the life-renter. There are cases in which that circumstance has, in connection with other circumstances, been taken into account; but it is by no means a conclusive circumstance. Whether the clause founded on in the present case is truly a substitution or destination over, in the sense and to the effect contended for, is a matter to which I shall afterwards advert.

As regards the purpose and tenor of the whole deed now under consideration, I am very clearly of opinion that the leading purpose of the testator was to confer the benefit of the great bulk of his

fortune on his daughter in life-rent, and on her children in fee. That purpose could best be carried into effect through the instrumentality of a trust; but, as already shewn, such an arrangement does not at all imply that the right of the children as fiars was not to vest during their mother's life; that in the event of the marriage of any of the daughters during their mother's life their right could not be made available in their marriage settlements, or that any of the sons, in the event of his entering into a profession or business, was to have no *jus crediti* that could be made available for his benefit. That is not presumable. I think it is rather to be presumed that the truster intended to give to the children all the benefits that a right of fee could give consistently with securing the life-rent interest of their mother.

Then the deed contains a clause which I think shews that the truster contemplated and authorized a termination of the trust before the death of the life-rentrix, if the trustees, in their discretion, should think fit to act upon it. The words are, that the residue now in question was "to be kept *in trust* by them *till* they, in their discretion, shall see proper to *settle* it in the most safe and secure manner on her and her children." I cannot read that clause as a mere instruction as to the investment of funds to be thereafter held by them in trust. The plain meaning of the words is, that the trust is to continue till, and only till, the trustees see proper to settle the trust fund in the most safe and secure manner, on the mother in life-rent and the children in fee. If the trustees had exercised that power the right to the fee must have vested in the children directly, instead of indirectly through the trust. That such a mode of dealing with the fund was a thing present to the mind of the testator appears to me to indicate very clearly that he intended by the deed to create a *jus crediti* in favour of the children.

It was argued that if the trustees were denuded of the trust under that clause the right of fee must have gone to the mother, as the trustees could not have introduced the word "allenarly" to qualify her right, no such word being in the trust deed. That is a fallacy. The trust deed did not prescribe any formula, and the duty of the trustees would have been to introduce whatever words were necessary to give her the same measure of benefit as

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she had under the trust deed, and no more. Suppose the mother had renounced her life-rent of the whole or a part in favour of her children, it does not appear that there was anything to prevent the children from demanding immediate possession and enjoyment. There is no clause of survivorship, nor is the right or the time of payment made contingent or conditional on an event which may never happen, such as marriage, or attaining majority; elements some of which are to be found in almost all cases in which the vesting is intended to be suspended. These considerations are all hostile to the notion that in this case vesting was suspended till the death of the life-rentrix.

On the other side of the question the feature most relied on, and most deserving of consideration, is the clause whereby the nieces are introduced. But, in the first place, that clause is not of the nature of a substitution. It is of the nature of a conditional institution or bequest depending on a condition or contingency which never did occur. In the second place, I think the contingency was excluded as soon as Mrs. *O'Reily* had issue of her body. The words "decease without issue of her body" may mean without leaving issue of her body surviving her, or it may mean without having had issue of her body; and it may depend upon circumstances which of these two meanings is to be attached to the words. The Appellants contend for the former of these meanings, and in that view they argue that the clause in favour of the nieces was tantamount to a substitution or destination over, and therefore gives aid to their contention that the vesting was intended to be suspended. Even if that were the character of the words, and that there was anything else in the deed to which they could give aid, I do not think that the aid would be material, or would go far towards displacing the other considerations I have alluded to. But I am not disposed to adopt the meaning which the Appellants attach to the words. I do not think that the testator intended to prevent Mrs. *O'Reily*, in conjunction with her children, being, as they might have been, all of full age, from making arrangements and dealing with their respective rights of life-rent and fee without regard to the contingent interests of the nieces.

For the reasons I have stated, my opinion is, that the right vested *à morte testatoris* in the class, some of whom were in exis-

tence at that time; and that a *jus crediti* vested in each child at its birth, although the amount of the benefit was subject to the contingency of there being more children born.

I do not think it necessary to notice in detail the several cases under the head "Vesting" that have been referred to. Each case depended on the particular terms of the deed which gave rise to it. But on a review of all the cases, I think that the scope and tendency of them is to the effect I have indicated. The leaning of the law is towards vesting, unless there be something in the deed to exclude that construction. I find nothing in this deed to exclude it.

The Appellants have another plea on the record, which, though it does not appear to have been much, if at all, relied on in the Court below, and is not noticed in the printed case for the Respondents, was pressed in argument at the bar with much ability, and deserves consideration. It is, that even assuming the residue to have vested as contended for by the Respondents, the share or interest of the children who pre-deceased the life-rentrix accrued to the survivors *jure accrescendi.*

The Appellants were the only survivors, and consequently the importance to them of this contention, if well founded, is obviously very great.

In support of it reference was made to the civil law, and to a passage in Lord *Stair's* Institutes, iii. 8, 27.

The doctrine of the civil law as to the *jus accrescendi* is subtle and unclear. The civilians differ in their interpretation of it, and even Lord *Stair* had not succeeded in making it quite intelligible. He begins his section on the subject thus: "The right of accrescence is that whereby the portion of an heir, legatar, or *fidei commissar* befalleth to another; not by a new and several succession, but by the first succession, and as part thereof. *We have little use of this;* and therefore I shall be shorter in the many subtile debates agitated amongst the doctors thereupon." Nevertheless he was led into writing a section of more than ordinary length with him, and not quite free from the subtlety he ascribes to the doctors, but which was perhaps inseparable from the subject. His remark, however, is true, that the doctrine is not much in use with us; and from the whole tenor of the dissertation referred to,

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it appears that the doctrine he was there more particularly dealing with had reference to the case of parties named by the testator to take immediately on his death, and as to what should happen if any of those conjoined in such a nomination cannot or will not enter or accept; that is, cannot, as by reason of having pre-deceased the testator, or being for some reason disqualified, or will not, as by choosing to decline. In such cases the interest which the testator intended to give to the party who cannot or will not take it was to go to the person or persons conjoined with him, or to be otherwise dealt with according to the form of words used. Thus *Stair* there says: "In the institution or substitution of heirs, or in legacies, and *fidie commisses*, if there be more persons, and some of them joint as to both matter and words, the rights of those so conjunct do accresce (*if any of the persons so conjunct do not or cannot accept*) to the rest of the conjunct, and not to those that are disjunct in the matter though they be conjunct in the words." The whole doctrine there treated of had reference apparently not to the case of a postponed interest, or of a subsequent succession, but to the case of parties who were to take in the first instance, or, in the words of Lord *Stair*, "the first succession." But we are not now dealing with a case in which there was any inability, or unwillingness, or failure to accept. The bequest was to a class, and the class must be held to have accepted the beneficial right which vested in them. It would be a mistake to suppose that Lord *Stair*, in commenting on the *jus accrescendi* of the civil law, recognised it as implicitly adopted into the law of *Scotland*. He not only begins the section (27) with the remark that the right of accrescence referred to is not in much use with us, but he also begins the next section (28) thus: "The law and customs of *Scotland* have reduced the matter of testaments and succession in moveables much nearer to natural equity, and made it much shorter and plainer than the *Roman* law."

I do not mean to suggest that the principle of accretion, or *jus accrescendi*, has no place in the law of *Scotland* in any conjunct rights. It is, to some extent, recognised, and although in most of the cases in which it is recognised authority for it may be found in the civil law, nevertheless it would be wrong to hold that everything on this subject that has authority in the civil law has been

adopted into the law of *Scotland*, and especially wrong to hold that the rules of the civil law applicable to the inability or unwillingness of parties to take at the testator's death are to be implicitly applied in our law to the subsequent succession to parties who have taken.

The passage cited from *Bell's* Principles, sect. 1882, also fails to support the contention of the Appellants. By the word "survivor" in that passage is meant the legatee who has survived the testator, and accordingly the authorities Mr. *Bell* refers to as collected in his illustrations of the passage cited, are cases in which one of the legatees had pre-deceased the testator, and the question was, whether the share of the legatee so pre-deceasing accresced to the survivor.

It is a general rule in the law of *Scotland* that where the right to a fee has vested it transmits or passes to heirs, unless in the nature of the subject, or in the language of the deed which gives the right, there is something that requires a departure from that rule. In the case of a legacy or bequest which has vested the rule applies as strongly as in other cases. The question of the vesting or not vesting of the right of fee pending a life-rent is, as I have already observed, a question of intention, to be gathered from the deed. The same observation applies to the question whether, in a case where the fee is provided to a class, the share of one of the class is on his death to accrue to the survivors of the class, or to go to his own heirs, by law or by will.

In every such question the governing rule is, that the intention of the testator must prevail, in so far as it can be reasonably inferred from the whole clauses of the deed. That such is the rule appears sufficiently from the two cases to which the Appellants have referred, as if they had been decided on some abstract rule of the civil law. In one of them, *Barber* v. *Findlater* (1), Lord *Jeffrey*, who was Lord Ordinary in the case, began his judgment in these words:—"The Lord Ordinary considers this a *questio voluntatis*;" and then he proceeded to examine minutely the clauses of the deed, and to inquire into the presumable intention of the testator. So also in *Tulloch* v. *Welsh* (2), Lord *Moncreiff*, who was Lord Ordinary in that case, said:—"The whole question

(1) 13 S. & D. 143. (2) 1 Dun. 94.

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is on the just and legal construction of the settlement in the clauses constituting and regulating the right of life-rent given. There certainly are rules derived from the civil law which have *some application* to that question, but the *governing rule* is, that the intention of the testator must prevail, in so far as that intention is expressed, or can be reasonably ascertained, from the whole clauses of the deed."

These cases were not decided on the authority of the civil law, though some mention of it was made incidentally. Nor do they otherwise support the contention of the Appellants; for they are distinguishable from the present case, not only in the clauses and language of the deeds, but in the nature of the thing that was the subject of contention. In neither of them was there was any competition for a right of fee directly involved. In both of them the question was, whether the annual proceeds of a fund were to be wholly paid to the life-renters so long as any of them survived, or whether upon the death of each life-renter a portion of the annual proceeds was to be set apart and accumulated till a future period, for the benefit of those who might ultimately become entitled to the fee. The question turned rather on the terms in which the right of life-rent was given than on the terms in which the right of fee was given. In such a question, as to the enjoyment of a temporary interest in the annual proceeds, the intention of the testator may be inferred from elements which would not indicate an intention to depart from the ordinary rule of law, that a right of fee which has once vested transmits or passes to heirs.

The only other case on which the Appellants founded in this branch of their argument was the case of *Burnet* v. *Burnet* (1). That case is in some respects peculiar, and the statement of it in the marginal note cited by the Appellants does not quite accurately express the ground of the decision. It was the case of a provision of a sum of money to children payable on majority or marriage. Several of them had attained majority before the death of their father; one afterwards died in minority unmarried. It was held that as some had attained majority the right to the sum of money had vested in the class; but as to the one who died, it was held

(1) 16 Dunlop, 780.

that as his right to participate in the fund was contingent on his attaining majority, or being married, and as neither of these contingencies had ever occurred, the whole sum was payable to those who did attain majority. That case clearly has no applicability to the present case, which has no such elements in it.

It is therefore necessary, in reference to the plea of accretion, to look for the intention of the testator. In doing so I assume, for the reasons I have already stated, that he intended the right of the children in the fee to vest, and did not intend that the vesting should be suspended till the death of the life-rentrix. That being so, and the general rule being that a fee once vested passes to heirs, unless there be in the deed conferring the fee something that excludes the application of that rule, I look to see if there is anything in this deed indicating an intention to exclude the application of the general rule. It is very easily excluded if such is the intention; and in the case of a bequest to a class, that is generally done by a clause declaring that, in the event of the death of any of the members of the class before the period of distribution, or before some other event specified, his share should go to the survivors, as is done in this same deed in regard to the testator's nieces; but there is no such clause in regard to his daughter's children. Upon the effect of the contrast between these two classes, I take leave to borrow the language of Lord *Jeffrey*, in the case of *Calder* v. *Dickson* (1). "The omission," he said, "from this part of the settlement of any such accrescing clause as will be found in the immediately-preceding part of it affords the strongest possible grounds for concluding that no similar arrangement was intended as to the provision now in question." Nor do I find in this deed anything else to lead me to the conclusion that, while the testator intended—as I hold he did intend—that the right of fee should vest in his daughter's children, he nevertheless intended that the ordinary incidents of a vested right should be excluded. I think that is not to be presumed.

On the grounds I have stated, I am of opinion that the interlocutors appealed against should be affirmed, and that the cause should be remitted back to the Court of Session.

(1) 4 Dunlop, 1368.

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THE LORD CHANCELLOR (1):—

My Lords, I have had an opportunity of seeing and considering the opinion which has just been delivered by my noble and learned friend. It coincides exactly with the view which I had, independently of it, taken of the whole case; and it expresses that view so fully and so completely, that I feel that I could add nothing useful. I shall therefore content myself with saying that I entirely agree in the opinion which has been expressed by my noble and learned friend, and in the conclusion at which he has arrived, that the interlocutors appealed from should be affirmed.

LORD CRANWORTH:—

My Lords, I am exactly in the same position as my noble and learned friend on the woolsack. My view of this case has been stated so fully and so ably by my noble and learned friend opposite, that I will only add that I rejoice to think that the conclusion at which the Court of Session has arrived in this case with respect to the law of *Scotland*, as I understand it, on the subject of vesting, is precisely similar to what the decision would have been if it had been an English case.

*Interlocutors affirmed, and the appeal dismissed, with costs.*

Solicitors for the Appellants: *Loch & Maclaurin.*
Solicitors for the Respondents: *Adam Burn.*

(1) Lord *Chelmsford.*

MACFARLANE & Co. . . . . APPELLANTS; 1868
TAYLOR & Co. . . . . RESPONDENTS. *March* 10.

*Breach of Contract—Unmarketable Article—Damages.*

A company of merchants ordered, and a company of distillers agreed to furnish, a cargo of whisky to be coloured like rum for the African market. It was stipulated that the colouring matter should be harmless. The stipulation was disregarded. The whisky produced effects alarming and startling, though not shewn to be actually deleterious. It consequently proved unmarketable:—

*Held*, that the distillers were liable in damages.

*Per* THE LORD CHANCELLOR:—The article has been sold for a specified purpose; and the seller must be considered to warrant that it is fit for that purpose.

*Issues for Trial.*

Where issues, though prolix and untechnical, have been the means of ascertaining the real justice of a case, they will not be displaced or disturbed on appeal.

*Amendments of Pleadings and Issues.*

Remarks by the Lord Chancellor shewing the facilities which exist in *England* for such amendments.

*Exception for Non-direction.*

Where the Judge's direction, if given, must necessarily have been *against* the Complainant:—

*Held*, that his exception for *non*-direction was properly disallowed.

MESSRS. *TAYLOR & Co.*, general merchants in *Leith*, traded with the West Coast of *Africa*, in various articles, but especially in whisky, coloured with burnt sugar, and made to resemble rum, so as to satisfy the taste of the natives, who objected to "white spirit."

In November, 1862, Messrs. *Taylor & Co.* dispatched for *Old Calabar* a large cargo of coloured whisky, which proved unsaleable; the natives, not unreasonably, fancying it to be poisoned,—some of them who tried it having found that it dyed their saliva and other secretions into the colour of blood.

The fact turned out to be that the whisky had been coloured, not with burnt sugar, but with logwood.

The consequent action, out of which the present appeal arose,

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was brought by Messrs. *Taylor & Co.* against the distillers (the above Appellants), by whom the whisky in question had been furnished, and to whom Messrs. *Taylor* had paid a large price with an express view to the African trade.

The point for decision was whether the article supplied by the Defenders was or was not conformable to the order given by the Pursuers; which order had reference to a sample of certain other whisky then shewn to the Defenders.

The following issues were directed for trial:—

Whether in or about September, 1862, the Defenders, on the order of the Pursuers, agreed to supply to them a quantity of whisky coloured with burnt sugar or other innocent material, similar to a sample of *Mackenzie & Co.'s* whisky then shown to the Defenders? Whether the Defenders delivered to the Pursuers a quantity of coloured whisky, amounting to 20,554 proof gallons; for which the Pursuers duly paid the stipulated price? And whether the coloured whisky so delivered by the Defenders to the Pursuers was disconform to the said order, inasmuch as it was coloured with some colouring matter, not being burnt sugar or other innocent material, similar to said sample,—to the loss, injury, and damage of the Pursuers.

At the trial, the Defender's counsel called upon the Judge to direct the jury, in the first place, that in order to entitle the Pursuers to a verdict it was not sufficient for them to prove that the material which coloured the whisky was injurious to its marketable quality; and secondly, that in order to entitle them to a verdict, they must prove that the colouring material was injurious to health. The Judge refused to give these directions. The jury returned a verdict for the Pursuers, assessing the damages at £3000.

The exceptions were afterwards disallowed by the First Division of the Court of Session, and a rule for a new trial was discharged. Hence the present appeal.

Mr. *Anderson*, Q.C., Mr. *Mellish*, Q.C., and Mr. *Maclaren*, were of Counsel for the Appellants.

Sir *Roundell Palmer*, Q.C., Mr. *George Young*, and Mr. *Shiress Will*, for the Respondents.

At the conclusion of the Appellants' argument their Lordships,

without calling on the Respondents, delivered judgment as follows:—

THE LORD CHANCELLOR (1):—

My Lords, the merits of this appeal were very fully and clearly laid before your Lordships yesterday by the learned counsel for the Appellants; and after the consideration which your Lordships have been able to give to the case, I venture to think that you will concur with me in the opinion that it is unnecessary for us to call upon the counsel for the Respondents.

My Lords, the facts of the appeal which require to be adverted to lie in an extremely small compass. The Respondents here, who were the Pursuers in the Court of Session, are the firm of *Taylor & Co.* merchants at *Leith*, who carry on trade with the West Coast of *Africa*. The Defenders in the Court of Session, who are the Appellants here, are the firm of *Macfarlane & Co.* who are distillers or rectifiers at *Port Dundas, Glasgow*.

The Pursuers stood in need of a certain quantity of spirits for the purposes of their trade with the West Coast of *Africa*, that is to say, for the purpose of bartering there with the natives in exchange for the productions of the country. They applied to the Appellants, Messrs. *Macfarlane & Co.*, and entered into a contract with them (the terms of which I shall have afterwards to advert to) for the supply of those spirits. So far as regards quantity, the spirits which were ordered were supplied, and a bill of exchange was drawn for the purchase-money, accepted by the Pursuers, and paid at maturity. And there, my Lords, the case would have ended but for this, that when the spirits reached the coast of *Africa*, and were used for the purposes of barter there, they were found, as the Pursuers allege, to be unmerchantable in their quality. And consequently an action was brought against the Appellants, Messrs. *Macfarlane & Co.*, by Messrs. *Taylor & Co.*, for damages in respect of the quality of the spirits.

In that action the record was closed in the usual way, and the parties not being able to agree upon the form of an issue, an issue was settled by the Inner Division of the Court of Session and went to trial. That trial occupied several days, and in the result the

(1) Lord *Cairns*.

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jury found a verdict for the Pursuers with damages to a large amount, namely, £3000.

The whole case is now brought up before your Lordships mainly upon two objections to those proceedings:—The first objection challenging the form of the issue which was settled by the Court; and the second being an exception to the ruling of the learned Judge at the trial as regards the law which he laid down to the jury, and as regards an alleged omission on his part to state to the jury what (as the Appellants contend) he ought in addition to have stated.

My Lords, in order to appreciate the argument upon the first of these questions, namely, the form of the issue, it is necessary to advert to the averments in the record with regard to the contract, and I cannot help noticing here (I hope with no undue prejudice in favour of the course which is pursued in this country) the inconvenience of the form adopted in *Scotland* as compared with the form which we now adopt in this country in an action of this description. In *England* the habit is, under the recent changes in procedure, for the Plaintiff to aver what he considers to be the legal result of the evidence which he will be able to adduce, as regards the form of the contract, and then if those averments are challenged to go to trial upon them. If in the course of that trial the evidence which he adduces, while it maintains in substance his averments, should differ from them in minor details, the Judge at the trial has the power to permit amendments of those averments, and thus to prevent any unnecessary expense or any failure of justice (1). In *Scotland*, on the other hand, there is in the pleadings a considerable amount of narrative, leading up to the averment of the concluded contract, and upon those averments the issue is agreed upon by the parties, or settled by the Court in default of agreement, and becomes, as it were, the stereotyped issue upon which the trial must be conducted. And if, as must constantly happen in the course of the trial, minor details appear which in some degree produce a variance from the averments upon the record, or from the issue as thus settled, there is always a danger of criticism and cavil as regards the question,—whether the issue, on the one hand, properly represents the point to be determined

(1) *Common Law Procedure Act of* 1852—namely, the 15 & 16 Vict. c. 76; see *Lush's* Common Law Practice, *Stephen's* edition.

between the parties, and whether, upon the other hand, the evidence sustains the issue as thus settled. I will not pursue this matter further than to say that I feel persuaded that it would be your Lordships' view upon all occasions of this kind, that while on the one hand you would not be disposed to maintain an issue which, in consequence of its form, had failed to determine the real question between the parties, so, on the other hand, your Lordships would be unwilling at this stage of the proceedings to allow mere criticism as to the wording of the issue, mere observation as to want of felicity of expression in framing the issue, to become the means of overthrowing the proceedings if your Lordships were satisfied that the real justice of the case had been ascertained between the parties.

My Lords, for the purpose of examining the form of the issue it will not be necessary to do more than to refer your Lordships to the fourth and fifth heads of the condescendence, in which we find a statement of the contract as alleged by the Pursuers. These have been so recently before your Lordships' eyes, that I do not propose to read them at length, but your Lordships will not fail to observe that, under the fourth head of the condescendence, there is a distinct averment by the Pursuers, and a distinct admission on the part of the Defenders, that the Pursuers stated, and the Defenders were aware, that the Pursuers required the spirits in question for the purposes of the *African* trade,—a trade in which spirits are bartered with the natives of the coast of *Africa*, for their consumption, and in return for the productions of the country.

Passing, my Lords, from the fourth article of the condescendence and going on to the fifth, we find that upon the occasion of making the contract there were two samples before the parties, which, to a certain extent, were referred to. There was a sample called "the sample of the *Macfarlanes*," which was adopted for the purpose of indicating the strength and defining the flavour which the spirit was to have, and for the purpose of settling the price. For those three purposes, strength, flavour, and price, the sample produced by the *Macfarlanes* was adopted, and was satisfactory to the Pursuers.

My Lords, if that had been all, and if the question now had arisen as regards either strength or flavour, I should have been of

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opinion, and I think your Lordships would have concurred with me, that all that would have been necessary would have been to determine the question of fact, what was the strength and what was the flavour of the sample produced by the *Macfarlanes*. But the matter did not end there. The desire of the Pursuers was to have spirits coloured in such a manner to represent as nearly as possible the colour of rum. The sample produced by the *Macfarlanes* was too light in colour for that purpose. It appears that there was in the room with the parties a sample of spirits produced by another house, the house of *Mackenzie*, darker in colour, and of a colour which represented the shade which the Messrs. *Taylor* desired to have upon this occasion. That sample of *Mackenzies'* was referred to for the purpose of defining the shade of colour; and the agreement with the Messrs. *Macfarlane* was, that they would colour up (if I may use the expression) the spirits which they would supply so as to bring them to the same colour as the sample of the *Mackenzies*.

These facts are averred in substance in the fifth article of the convescendence, which concludes with this statement:—

"The Defenders know, and were expressly informed, of the purpose for which the spirits were wanted, and that they were intended for human consumption, and that, while colouring was required, the colouring matter must be such as in no degree to impair the quality of the whisky, or render it unfit for use."

It was contended by Mr. *Mellish* that this was in substance a sale of spirits by sample. It was a sale by sample to a certain extent, but only to a certain extent. It was a sale by sample so far as regards strength, and so far as regards flavour, but as regards colouring it was not a sale by sample beyond this, that a shade of colour which might just as well have been represented upon paper, or upon wood, or upon any other material, was produced in a sample of coloured whisky, which was to be the shade of colour adopted as a pattern by the Messrs. *Macfarlane*. But the question how that colour was to be produced, whether it was to be produced by one device or by another, so far as the averments are concerned, was not a matter of definition or statement between the parties.

It is proper that I should, at this stage of the case, remind your Lordships of the Act of Parliament that was passed in the year

1856, termed, "An Act to amend the Laws of *Scotland* affecting Trade and Commerce" (1). By the 5th section of that statute an enactment was made for the purpose of assimilating, as far as possible, the law of *Scotland* upon this subject to the law of *England*. The 5th section declares that the vendor of goods, as a general rule, "shall not be held to have warranted their quality or sufficiency, but the goods, with all faults, shall be at the risk of the purchaser, unless the seller shall have given an express warranty of the quality or sufficiency of such goods, or unless" (which is more material to the present case) "the goods have been expressly sold for a specified and particular purpose, in which case the seller shall be considered, without such warranty, to warrant that the same are fit for such purpose."

Now, I think your Lordships will be of opinion, beyond all doubt, that these goods were sold for a specified and particular purpose, namely, for the purpose of trade and barter upon the West Coast of *Africa;* and if that is so, and if the operation of this enactment is not excluded by anything which passed in this case, the result is, that the law steps in and says, that with regard to the goods so sold for such specified and particular purpose there shall be implied a warranty that the goods are fit for that purpose.

My Lords, with these observations I think your Lordships will have no difficulty in dealing with the form of the issue, which upon these averments, and with reference to this state of the law, was settled by the Court between the parties. The issue consists of three questions. The second may be put out of the case, for no difficulty arises as to that; the difficulty which arises has been made by the first and third of the questions. The first question is this, "Whether in or about September, 1862, the Defenders, on the order of the Pursuers, agreed to supply a quantity of whisky coloured with burnt sugar, or other innocent material, similar to a sample of *Mackenzie & Co.'s* whisky then shewn to the Defenders." The burden of the objection (as was very properly stated by Mr. *Mellish*) to the issue was with regard to the word "innocent." And I certainly am not at all of opinion that this issue might not have been expressed more happily. I think that words more appropriate to the averment, and more appropriate to the

(1) 19 & 20 Vict. c. 60.

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state of the law, might have been introduced into the issue. But the question is:—Was there in this form of issue anything so wrong, so much at variance with what was the real question to be tried, that your Lordships should now refuse to maintain it? Looking at it in that point of view, I cannot think that there is anything in this issue which could have misled the jury, or could have failed to express to them the question which was to be tried. The word "innocent" is, no doubt, a word of many meanings; but in this particular context it is used in connection with a commodity which is referred to, burnt sugar; and the meaning obviously is this:—The whisky was to be coloured either with burnt sugar, a material which could produce no ill effect upon the spirit, or with some other innocent material, that is to say, some other material *ejusdem generis*, which would be equally free from any charge of injuring the material into which it was introduced. In other words, the term "innocent" would correctly represent a material which would not be injurious to the commodity by rendering it unfit for the purpose for which it was intended—which, in other words, is exactly expressing what the Act of Parliament lays down as the implied warranty in the case of such a sale of goods.

If that be so, my Lords, I do not think that any reasonable objection can be made to the third head of the issue; although I may say again that I should have been well content if it had simply proposed the question whether the coloured whisky delivered by the Defenders was not conformable to the order. I believe that would have expressed all that was necessary to be determined, but it has gone on to say, "inasmuch as it was coloured with some colouring matter not being burnt sugar, or other innocent material similar to said sample, to the loss, injury, and damage of the Pursuers." These words are somewhat involved in their form, but I read them as importing a want of conformity to order, inasmuch as the whisky was coloured similarly to the sample, but the colouring matter was not burnt sugar, or other innocent material; referring the jury back therefore, in substance, to the first head of the issue, and asking them whether the contract was as averred in the first head of the issue, and whether the spirits which were delivered were or were not in accordance with that contract? Upon that issue, therefore, I should humbly venture

to advise your Lordships that there is no ground at this stage for finding fault with the form of it, now that it is brought up before us.

I pass on to the next part of the case, which deals with the charge of the learned Judge, the objections to which charge are expressed in the fifth and sixth exceptions. For reasons which will be obvious, I propose to ask your Lordships to consider the sixth exception before the fifth. The sixth exception suggests what the learned Judge ought to have told to the jury, and it alleges that he ought to have directed the jury in point of law, first, "That in order to entitle the Pursuers to a verdict on their issue it is not sufficient for them to prove that the material with which the whisky was coloured was injurious to the marketable quality of the whisky. Secondly, that in order to entitle the Pursuers to a verdict on their issue, it is necessary for them to prove that the material with which the whisky was coloured was injurious to the health of the consumer."

Now, my Lords, there is no doubt that this expresses very clearly and distinctly what it is that the Appellants contend for, and what it was that they desired to submit to the jury; and I am not at all surprised at this contention; because in it there is the only possible chance of the Appellants succeeding upon this trial. The Appellants knew very well—having regard to the medical evidence adduced on both sides—the state of facts that was brought before the jury was this:—that the colouring matter introduced into this spirit being logwood, it would be correct with regard to it to say that it was not such a material as that its introduction into the spirit would endanger life, or perhaps seriously endanger health; but that, on the other hand, it would, beyond all doubt, be productive of symptoms and effects upon the human frame which would be in the highest degree unpleasant and alarming to the person who was taking the spirit, and would be such as to a certainty would prevent either him or any other person knowing of those effects from dealing any further with regard to that spirit. Therefore it was that the Appellants were naturally anxious that there should go to the jury the question touching the effect of this coloured spirit upon health and upon life, and not a question touching its fitness for the purpose for which

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it was intended, namely, as a merchantable spirit for the coast of *Africa*. But, my Lords, that exception being taken, I venture to think that your Lordships will have no difficulty at all in agreeing with me in saying, that if the learned Judge had given this direction to the jury it would have been a distinct and palpable miscarriage upon his part. An express warranty that the spirit should not endanger life is nowhere suggested to have been given. An implied warranty that the spirit should not endanger life is not the implied warranty which is defined by the Act of Parliament. The Act of Parliament defines the implied warranty to be this, that the spirit should be fit for the purpose for which it was intended, and I apprehend it would have been an error on the part of the learned Judge if he had in any way departed from those expressions, and had told the jury that under the term "innocent" they were to consider, not whether the spirit had been coloured in a way rendering it unfit for the purpose for which it was intended, but whether it had been coloured in a way rendering it dangerous to life or to health.

Therefore, taking the sixth exception, I own I cannot myself entertain any doubt, and I think your Lordships will not entertain any doubt, but that the issue tendered here by the Appellants is an erroneous one; and that the Judge is not in any way to be found fault with because he did not give this direction to the jury.

Then, that being so, I turn now to the fifth exception. The fifth exception complains that Lord *Kinloch* directed the jury "that the word 'innocent' as contained in the issue, was not a legal term, nor one on which it was necessary that he should put a legal construction; and that it was for the jury to say, upon the evidence, whether the thing was innocent or not in the fair and reasonable sense of the word as employed in ordinary language." Now, my Lords, I say again here what I took leave to say with regard to the form of issue, I should have been well satisfied if the learned Judge had thought it right to go somewhat further, and had directed the jury that by the term "innocent" their minds must be led to consider whether anything had been done to the spirit which had rendered it unfit for the purpose intended. But what I apprehend your Lordships have to consider here, is, was

this statement which is expressed in the fifth exception erroneous, so far as it goes? And in respect that the learned Judge did not go further, was there any failure of stating matter of law to the jury which has led to a miscarriage, or may fairly be supposed to be calculated to lead to a miscarriage, on the part of the jury?

So far as the charge of the learned Judge goes, I think no exception can fairly be taken to it. It appears to me to be not inaccurate so far as it is set out upon the bill of exception. Is it the case that the jury might have been misled by the learned Judge not going further? What was said by one of the learned Judges in the Court below appears to have a material bearing upon this case. The learned Judge said that the jury knew that there really were two questions between the parties—whether the Pursuers were right in saying that it was enough to prove that the spirit was unfit for the purpose for which it was intended, and whether the Defenders were right in contending that the proof ought to shew that the spirit was dangerous to life or to health. The jury heard the learned Judge asked to give the direction which is indicated in the sixth exception—they heard that direction refused to be given—and they could not but have been aware that that left one point, and only one point, for the jury to determine, namely, whether the spirits had been coloured with colouring matter which was innocent, that is to say colouring matter which would not be injurious to the spirit, having regard to the purpose for which it was intended. And if that be so, then I apprehend that the jury could not in any way have been misled—and if they were not misled then I apprehend that upon a question, not of misdirection but of nondirection, your Lordships will indeed be slow to hold that merely because the Judge might with propriety have stated more to the jury than he did state, although anything more which he could properly have stated would have been in favour not of the Appellants, but of the Respondents, yet the Appellants were, on the ground of that omission, entitled to object, and upset the whole proceeding.

Upon these grounds, my Lords, I have no doubt at all that the satisfactory conclusion to arrive at is this, that these exceptions were properly disallowed by the Court below; and that neither to the form of the issue, nor to the charge of the learned Judge, has

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any objection been shewn which ought to lead your Lordships to disturb the interlocutors of the Court below. I therefore venture to advise your Lordships to confirm those interlocutors, and to dismiss this appeal with costs.

LORD WESTBURY:—

My Lords, if your Lordships are satisfied that substantially the real question is embodied in the issues, and that it has been tried in a satisfactory manner, you will, I feel certain, be most unwilling to interfere with them, although you may be of opinion that they have not been skilfully extracted, and are expressed in a prolix and perhaps awkward manner.

Nothing could be simpler than the original transaction, or more plain than the question which arose out of the circumstances that occurred.

The Pursuers were desirous of buying a quantity of coloured whisky to be sent to *West Africa* as a commodity to be bartered to the natives. The Defenders tendered to supply the whisky, and produced to the Pursuers a sample which was approved as to price, flavour, and strength, but not as to colour, which was required to be deeper; and the Defenders then agreed to make the colour equal to that of another sample of coloured whisky which the Pursuers produced to them as a standard of colour, and they engaged to deliver the whisky accordingly. The contract was thus complete. Nothing passed as to the colouring matter which should be used, but underneath the contract, of course, lies the implied general engagement that the article sold shall be fit for use, that is, for human consumption, being the purpose for which it was sold.

The whisky was taken to the coast of *Africa*, and part of it having been supplied to the natives, it was found to produce very unpleasant and alarming, if not injurious, effects on the bodies of those who drank it; and the whisky thereby became unmarketable. It was ascertained that these effects on the body of the consumer, being such as ordinary whisky, or whisky coloured with burnt sugar, does not produce, were due to the colouring matter that had been used by the Defenders. It would seem that whisky had been commonly coloured by burnt sugar, but that the Defenders had

used logwood, or a decoction or extract of logwood, for the purpose of producing the colour required, and which material, according to the evidence, does not appear to have been previously used for such purpose.

Under these circumstances, the question that arose in fact was—whether there had been a breach of the implied contract, or, in other words, whether the whisky which the Defenders had coloured with logwood was fit for use and human consumption. It was a fit question for a jury as the law now stands, although I venture humbly to think that if the question had been argued and the witnesses examined before Lord *Kinloch* sitting alone, a satisfactory conclusion would have been arrived at without any chance of miscarriage in procedure, and with an infinitely less expenditure of time and of money. The parties could not agree as to the form of wording the issues, which were accordingly settled by the Inner House; and the issues so settled, though unnecessarily long and cumbrous, in effect amounted to this:—Was the whisky supplied by the Defenders coloured by means of an innocent material?

The trial lasted five days, and the evidence shewed that logwood colouring produced effects on the body of the consumer which, to say the least, were very disagreeable and alarming; it had an astringent effect; it affected the saliva and the secretions from the kidneys, giving them the colour of blood; and it changed the colour of the skin down to the fingers and nails. I cannot conceive a more alarming picture to be presented to an *Edinburgh* or *Glasgow* jury, where toddy is supposed to be in great esteem. The jury found unanimously a verdict for the Pursuers, thereby in effect finding that the colouring material was not innocent, and that the whisky was not fit for use.

The contention by the Appellants at the trial was, that the learned Judge ought to have given to the jury an explanation of the meaning of the word "innocent," and ought to have in effect told them that, although it appeared that the whisky was unmarketable, yet that it did not follow that the whisky was not innocent. I think the learned Judge was right in declining to do any such thing. The word "innocent" was used in the issues in its ordinary popular sense, and it was for the jury to find upon the

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evidence whether the colouring matter, or the whisky as coloured by it, was innocent, that is to say, harmless in use; and the jury had nothing to do directly with the question, whether the whisky was or was not marketable, otherwise than as that might be the result of finding that the colouring matter was not harmless, that is, not an innocent thing?

I therefore entirely approve of the manner in which the case was left to the jury by the learned Judge, which is thus stated in the bill of exceptions:—"Lord *Kinloch* directed the jury that the word 'innocent,' as contained in the issue, was not a legal term, nor one on which it was necessary that he should put a legal construction, and that it was for the jury to say upon the evidence whether the thing was innocent or not in the fair and reasonable sense of the word as employed in ordinary language." I think, having regard to the issues and the evidence, that this was a proper mode of leaving the case to the jury, and it was certainly a mode more favourable to the Appellants than to the Respondents.

I therefore entirely agree with my noble and learned friend upon the woolsack that the appeal should be dismissed with costs, so far as it is an appeal from the interlocutor settling the terms of the issues, and that the exceptions should in like manner be overruled.

LORD COLONSAY:—

My Lords, the views which I entertain upon this case, both as regards the true meaning and construction of these issues, and as regards the exceptions which have been taken to the charge of the learned Judge, have been so fully stated by my noble and learned friends who have preceded me that I do not think it necessary to make any addition to their statements. I think that, as regards the exceptions, the moment it is held that the sixth exception must be disallowed, it follows almost of necessity from that itself that the fifth exception cannot be maintained, because in that case the Appellants would require to shew what direction ought to have been given that would be consistent with their contentions in this case. Any direction that could have been given consistent with the views which have been expressed by my noble and learned friends, and in which I entirely concur, must have been a direc-

tion not tending in favour of the Appellants, but an additional direction leading towards the verdict which the jury did find. I therefore concur entirely in the affirmance of the interlocutors complained of.

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*Interlocutors affirmed, and appeal dismissed with costs.*

Solicitors for the Appellants: *Simson & Wakeford.*
Solicitors for the Respondents: *W. & H. P. Sharp.*

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J. A. G. C. CAMPBELL (CLAIMING TO BE EARL OF BREADALBANE, &c.) . . . . . } APPELLANT;

THE EARL OF DALHOUSIE, *et al.* (TRUSTEES AND EXECUTORS OF THE LATE MARQUIS OF BREADALBANE) . . . . . } RESPONDENTS.

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FIRST AND SECOND APPEALS.

*Improvements by Heir of Entail under the Montgomery and Rutherford Statutes.*

*Finality of the Decree under the Montgomery Statute.*

The decree in the action of declarator calling as Defender the next collateral heir is final, and bars all subsequent resistance.

*Per* THE LORD CHANCELLOR:—Parliament conceived that the maker of the improvements would protect his own issue, and that the collateral heirs would be sufficiently guarded by calling the first of them,—those coming after having liberty to intervene.

*Per* LORD WESTBURY:—The decree is final against the issue of the collateral heir called, in the same manner as it is final against the improver's own issue.

*Requirements of the Decree.*

The decree must shew with reasonable certainty that the improvements are truly within the meaning of the statute.

*Election under the Statutes.*

*Held* (reversing the decree below), that where the improving heir had obtained and exercised authority under the *Rutherford Statute*, he abandoned all remedies under the *Montgomery Statute*.

*Signature to the Account under the Montgomery Statute.*

If an heir of entail makes improvements on the estate with a view to charge the heirs succeeding him, he must annually, within four months of the term of Martinmas, and while the improvements are in progress, lodge in the

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Sheriff's office an account, with vouchers, of the sums expended by him; and such account must be signed by him.

But where the improving heir had died four days before the term of Martinmas, and where, consequently, his signature was impossible:—

*Held*, that the signature of his executor, or personal representative, was, under the circumstances, sufficient.

*Costs.*

*Per* LORD WESTBURY:—When the counsel for a party considers that there is any question of costs to which he wishes to address himself, he must make it part of his original argument.

IN 1834 the late Marquis of *Breadalbane* succeeded as heir of entail to the great estates of his family, and he possessed them until his death, without issue, on the 8th of November 1862, when the succession devolved on the above Appellant.

Relying on the compensation provided by the *Montgomery* (1) and *Rutherford* statutes (2), the Marquis had from time to time expended considerable sums in improving the entailed estates. His trustees and executors brought two actions to recover the amount demandable under the statutes from the Appellant as the next heir in possession. The Court of Session decided in their favour (3); and hence these appeals to the House.

Sir *Roundell Palmer*, Q.C., Mr. *Mellish*, Q.C., and Mr. *Young*, were heard for the Appellant.

The *Lord Advocate* (4), and Mr. *Watson*, for the Respondents.

The merits of the question, with the arguments of counsel, as well as the facts of the case, are all fully dealt with and examined in the following opinions.

THE LORD CHANCELLOR (5):—

My Lords, these two appeals raise some questions which are of importance to the parties, but which do not, as it appears to me, present any difficulty as to the conclusion at which your Lordships should arrive.

(1) 10 Geo. 3, c. 51: "An Act to encourage the Improvement of Lands, Tenements, and Hereditaments in *Scotland*, held under Settlements of Strict Entail." 1770.

(2) 11 & 12 Vict. c. 36: "An Act for the Amendment of the Law of Entail in *Scotland*," 14 August, 1848.

(3) See 3rd Series of the Court of Session Cases, vol. iv. pp. 775 & 790.

(4) Mr. *Gordon*.

(5) Lord *Cairns*.

The questions may be conveniently divided into four:—three arising out of the first appeal, and one out of the second.

With regard to the first of these four questions, your Lordships have to consider what is the meaning and the effect of the *Montgomery Act*, the 10 Geo. 3, c. 51. Under that statute the heir of entail who proposed to execute improvements was to give to the parties who might succeed him certain notices of his intention to execute the improvements; and then if, after the improvements were executed, he desired in his lifetime, while the evidence was fresh in the minds of those who could speak to the expenditure, to have a judicial certificate for the same, provision was made for his obtaining a decree of Court, declaring the sum in respect of which he was to stand as having a charge on the estates. What he had to do was this:—under the 26th section he was to commence an action of declarator before the Court of Session, or a process of a similar kind before the Sheriff. In that action he was to call, not his own lineal descendants (for the Act appears to have assumed that their interests would be sufficiently protected by him who was their immediate or remote parent), but the heir next entitled to succeed after the heirs of his own body. And in that suit he was to produce proper evidence of the amount laid out in such improvements. And then that next heir who was so called, and any other heir of entail, whether called or not, was to be entitled to produce evidence to set aside or diminish the claim. And then it was to be lawful for the Court of Session, or for the Sheriff, to pronounce a decree for such part of the sum proved to have been expended as, by the true intent and meaning of the Act, was intended to become a charge against the succeeding heirs in the entailed estate. And that decree, if pronounced by the Sheriff, was to become final, unless carried to the Court of Session by suspension within six months. And if pronounced by the Court of Session, either in such process of declarator, or suspension, it was to be final if an appeal was not brought within twelve months. The late Marquis of *Breadalbane*, under this Act, commenced five actions of declarator in the Court of Session, and in all of them he obtained decrees, amounting to a very considerable sum of money in the whole. In those actions the person called was the father of the present Appellant, who at that time, subject to the

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possibility of the late Marquis having issue of his own body, was the heir presumptive next entitled to the estates. The present Appellant was not called, but his father, he being the next collateral heir in tail at the time. And the present Appellant now contends that, inasmuch as he was no party to those proceedings of declarator, he is not bound by them; he contends that those decrees of declarator have not conclusively awarded, as against him, that the sums of money in question were properly expended; and he claims the right to open up the question as to the amount of expenditure, and to contest the propriety of the sums included in the decrees of declarator being charges on the estates.

My Lords, if that contention were right very serious consequences would ensue; because your Lordships will readily see that this Act of Parliament making provision for the calling in the action of one heir only in the entail, namely, the next collateral heir to the person making the improvements, if every person but the heir so called was to be free afterwards to dispute all that had been done, the chances would be very strong in favour of that collateral heir not happening to be the person on whom the succession would ultimately fall; and this provision of the statute, so carefully framed to all appearance for the purpose of preventing subsequent disputes, would probably in many, or in most instances fail of having that operation.

It appears to me impossible to give a rational meaning to this section, where it provides that a particular heir shall be called, and gives permission to other heirs not called to intervene and dispute the claims should they think fit, if the statute meant to say that the proceeding of declarator thus commenced was to be binding upon one heir and no one else; if that had been the object of the Legislature it might at once have been accomplished by saying that the person who made the improvements might raise an action of declarator, and might call in that action whom he pleased, and that what was done in that action should be held to bind those whom he called, and no one else.

But I apprehend your Lordships will be of opinion that the rational and common sense construction of the section is, that Parliament meant to provide for a means of setting at rest all disputes after the death of the person making the improvements,

and for that purpose Parliament conceived that the direct and lineal issue of the heir of entail making the improvements would be sufficiently protected by their ancestor, who would care for their interest; and that the persons next in succession, the collateral heirs, would in their turn be sufficiently protected by the calling of the first of those collateral heirs next in succession, and giving him an opportunity of appearing as a party disputing the claim, with the further privilege to the other heirs of appearing if they thought fit and advancing any argument they could against the claim. For myself, my Lords, I have no doubt, and I think your Lordships will be of the same opinion, that the proceedings taken by the late Marquis of *Breadalbane*, so far as regards the persons bound by them, are proceedings which established conclusively the propriety of the expenditure made by him, and that, there having been no appeal from these decrees, these decrees are final, and are binding upon the present Appellant.

We have next, my Lords, to consider the second question arising under the first appeal, as to the objection which was made to the form of the decrees themselves. And I think your Lordships will not find it necessary to consider for that purpose more than one of the decrees of declarator; the observations that occur upon that one being substantially the same as those that occur upon the other decrees of the same kind.

It is said that under the *Montgomery Act* any decree of declarator ought to shew, on the face of it, the character of the improvements which have been made, in order that any one reading the decree may see upon what kind of improvements the expenditure took place, and so may be able to judge whether the improvements were of the kind contemplated by the Act; for, as your Lordships know, the Act contemplated improvements of four specified kinds only.

Now the decree purports to be "In a summons and action of declarator of entail improvements instituted before the Lords of Session," &c. The words "entail improvements" are themselves technical words, and are obviously used in this decree, as they appear to have been used in many other proceedings, for the purpose of describing those improvements made by an heir of entail in possession in respect of which he was to be entitled to charge

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under the *Montgomery Act.* But having so begun, the decree proceeds to state that the action was brought by the Marquis of *Breadalbane* against *Campbell of Glenfalloch,* and that the summons is dated and signeted the 10th May, 1844, and libels *inter alia,* upon the Act of Parliament passed in the 10th year of *George* III. (giving its title). That is to say, the libel is founded upon the *Montgomery Act,* giving to an heir of entail in possession a right to compensation in respect of improvements. The decree then states that the summons is founded "also upon the notices or intimations given in terms thereof," and that it concludes for decree as thereinafter expressed. Then the Lords of Council and Session find that a certain sum was expended by the Pursuer in improvements upon the lands and estate, and they declare three-fourths of the same to be a debt existing against the heirs of entail who may succeed the Pursuer in the said estate; and they further decern and ordain that *William John Lambe Campbell,* or the next heir entitled to succeed to the estate immediately after the Pursuer, on his so succeeding should make payment of a certain sum in respect of that debt; and the whole concludes with these words, "conform to the said intimations, accounts, and vouchers libelled on, the said Act of Parliament, and laws and practice of *Scotland.*"

Now, my Lords, the Act of Parliament itself prescribes no form whatever for the decree. The decree, as far as regards form, is left to the discretion of the Court in which the proceedings take place; and all, as it appears to me, that your Lordships have to determine is whether, with a reasonable certainty, you can find upon the face of the decree that the improvements there spoken of are improvements claimed for and recognised in pursuance of the Act of Parliament. And I think that no doubt can be entertained by any person reading this decree that what the Court of Session intended to affirm was, that the money alleged to have been laid out had been laid out in improvements under and according to the Act of Parliament, and that they were declaring that the Pursuer was entitled to charge for those improvements as improvements warranted by the Act of Parliament. Therefore I have no hesitation in expressing my opinion that upon the second objection the Appellant has failed to advance any argu-

ment which should entitle him to succeed in objecting to the finality of these decrees of declarator.

And now, my Lords, we come to the third question arising upon the first appeal—namely, as to the effect of the proceedings taken by the late Marquis of *Breadalbane* under the *Rutherford Act.* For the purpose of considering those proceedings, I must remind your Lordships that the scheme of the *Rutherford Act* appears to be this. In place of leaving the heir in tail to pursue the somewhat cumbrous and tedious remedy of the *Montgomery Act,* it provides that if the heir in tail had obtained a declarator as to the amount of money expended on improvements, he might come in under the *Rutherford Act;* and with a view immediately to realize the sums which he had expended, or to raise money upon the security of the charge to which he was entitled, he might obtain the permission of the Court of Session to execute a bond either for an annual rent-charge with reference to the amount of the expenditure, or a bond for a gross sum of money, being two-thirds of the sum for which he had a charge.

The late Marquis of *Breadalbane* availed himself of the advantages of the *Rutherford Act.* He instituted a proceeding in the Court of Session, founding himself upon the decrees of declarator which he had obtained, and asking to be allowed by the Court of Session to issue a bond or bonds of the kind which I have described. He obtained the authority of the Court of Session in the form of a decree, and he acted upon the decree to the extent of executing a bond, with the approbation of the Court, to the extent of £20,000 for an annual rent-charge. The whole sum for which he was entitled to claim was more than that—namely, £25,000. For the difference between those two sums, namely, £5,200 no bond was executed; but the decree of the Court of Session under the *Rutherford Act* professed to authorize the issuing of a bond or bonds for the whole amount.

My Lords, it was, in the first place, contended on the part of the Appellant that, under the 19th section of the *Rutherford Act,* the giving of one bond, even although it was for a smaller amount than the amount for which the late Marquis was entitled to stand as a creditor, annihilated his claim for the whole of his expenditure, whatever it might be. And the Appellant founded his

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argument upon the wording of the 19th section of the *Entail Amendment Act*, which enacts:—

> That the granting under the authority of this Act of any bond of annual rent, or bond and disposition in security, in respect of any improvements executed or to be executed on an entailed estate in *Scotland*, shall operate as a discharge of all claims for or on account of such improvements against such estate, and the rents and profits thereof, and the heirs of entail succeeding thereto, save and except the claims under such bond of annual rent, or bond and disposition in security themselves.

It would be one of the most unreasonable interpretations that could be conceived of that section to hold that if an heir in tail had a claim for £25,000 under the *Montgomery Act*, and came into the Court of Session for leave to execute a bond under the *Rutherford Act*, and obtained from the Court of Session that leave, and if he, not being able perhaps to obtain a customer for the whole sum, executed a bond in the first instance for £1000, part of the £25,000, that he should therefore be considered to have annihilated his claim for the remaining £24,000. I think there is no occasion so to interpret the section, and any such interpretation would be an unreasonable one. It would be unreasonable, even if we had not regard to the ordinary clause at the end of the Act of Parliament, that a singular term includes the plural, and that the word "bond" may include "bonds." Having regard to that interpretation, it appears to me that this section is to be read distributively; and that it means that the giving of any bond under the *Rutherford Act* shall, as to the amount of that bond, be a valid discharge of any claim that might exist against the estate under the *Montgomery Act*.

But the question still remains, whether the effect of the Marquis of *Breadalbane* constituting himself a creditor under the terms of the *Rutherford Act*, was not an election by him to stand upon that Act, and that alone, and to abandon the position which he previously had under the *Montgomery Act*. When we look at the different provisions of these two statutes, it appears to me that it is impossible to arrive at any conclusion but this—that the proceedings taken by the late Marquis of *Breadalbane* under the *Rutherford Act* were an abandonment by him of his position under the *Montgomery Act*. Under the *Montgomery Act* the charges which were defined by the decrees of declarator were all subject to this

contingency or condition, that it should turn out at the death of the Marquis that these charges did not exceed in amount a certain number of years' value of the estates. The *Rutherford Act* appears to have dispensed altogether with that condition, and to have treated any person who obtained a decree of declarator as entitled to stand absolutely as a creditor for the amount of that decree, whether the sum might or might not exceed the supposed number of years' value of the estate. It would, therefore, be very strange if an owner in tail who had taken the benefit of this subsequent Act were afterwards to go back to the former Act, and to reopen the question as to the amount of charge which it might thus be necessary to consider. But the difficulty becomes much greater when we remember that a bond for £20,000, part of the £25,000, had actually been issued and is in force under the *Rutherford Act*. For the question immediately arises thereupon :—If the £5200 is to be recovered, not under the *Rutherford Act*, but under the *Montgomery Act*, in what way can you apply the provisions of the *Montgomery Act* as regards the relation between the sum charged and the annual value of the land which is to be taken into account? It appears to me that upon that ground alone it would be impracticable for the representatives of the late Marquis to work out any remedy in respect of this sum of £5200 under the earlier Act of Parliament. Further than that, we must remember that the consequence of holding both these Acts of Parliament to be operative as to one charge would be this, that the present heir in tail would have to pay in respect of the bond issued under the *Rutherford Act* a certain annual sum, or a certain gross sum. If the *Montgomery Act* is also to be put in force against him, and if he were unable to pay the sum of money in respect of which it was put in force, his only alternative would be to surrender one-third of the annual income of the estate for the purpose of payment. He might thus be harassed in the most serious and inconvenient way by the double operation of the two Acts of Parliament. I think your Lordships would be slow to arrive at the conclusion that that could have been the intention of the Legislature. In my opinion, and I hope your Lordships will concur with me, the proper and fair construction of the provisions of the *Rutherford Act* is—that the person who proposes to avail himself of them puts the rights

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which he previously had in a position to be governed and operated upon by the later Act of Parliament. It is not in this proceeding that your Lordships will express any opinion as to what ought to be done, or whether anything ought to be done, with respect to the £5200, which, in my view of the case, if recovered at all, must be recovered under the *Rutherford Act.* That will be for consideration in some other proceeding. For in the conclusions of the present summons no application is made to the Court by the Pursuers for relief under the *Rutherford Act* in respect of that sum.

If your Lordships concur with me so far as I have gone, the result will be that the first appeal must fail in all respects, except as regards the sum of £5200. As to that your Lordships will assoilzie the Defenders from the conclusions of the summons, without prejudice to proceedings that must be taken, if so advised, in some other form in respect of that sum.

I now come, my Lords, to the second appeal, as to which only one question arises. It appears that in addition to the sum covered by the five decrees of declarator to which I have referred, certain further sums are alleged to have been expended by the late Marquis of *Breadalbane* upon improvements which never became the subject of any decree of declarator, and his representatives claim against the present Earl for the amount. The Appellant contends that the conditions of the *Montgomery Act,* under which those sums are claimed, have not been complied with in this respect. The 12th section requires:—

> That the proprietor of an entailed estate who lays out money in making improvements upon his entailed estate, with an intent of being a creditor to the succeeding heirs of entail, shall annually, during the making such improvements, within the space of four months after the term of Martinmas, lodge with the Sheriff or Steward Clerk of the county within which the lands and heritages improved are situated, an account of the money expended by him in such improvement during twelve months preceding that term of Martinmas, subscribed by him, with the vouchers by which the account is to be supported when payment shall be demanded or sued for.

Now here no such account subscribed by the late Marquis was lodged in the manner prescribed by the Act. In point of fact no such account could have been lodged, because the late Marquis died, I think, four days before the term of Martinmas, which I believe is the 11th of November.

The question, therefore, which the second appeal raises is in substance this:—whether the clause I have read is an absolute condition to the right of claim for improvements, or whether it is a clause of direction only, with respect to which if an adequate reason for non-compliance, such as the act of God, is shewn, the non-compliance would not disentitle any person who otherwise has a proper title to compensation for improvements. Beyond all doubt the clause relates to an act to be done subsequently to the expenditure, and in addition to it. And it appears to me that there is nothing in the words of the clause which should lead your Lordships to hold that it is even a subsequent condition. The words are simply by way of enactment, although the section commences with the term "Provided," the enactment being for the purpose of securing, if it can be secured, the written testimony and statement of the person who has made the improvements, that they have been made in the manner in which they ought to be made in order to found a claim. If by the act of God it becomes impossible that the claim can be signed, it appears to me that it would be construing the Act of Parliament in a way in which no clause of the kind has ever been construed, if we held that where the act of God thus prevented a compliance with the words of the statute, the proprietor or his representatives should thereby be prevented from making a claim for improvements. No authority has been mentioned to your Lordships which has gone to such an extent. Certain cases were referred to where, the proprietor being in existence who might have subscribed the statement which the Act prescribes, an attempt was made to substitute the signature of the factor or agent for the signature of the principal. In such cases it may have been very well decided, and it may be that your Lordships would hold, that if the proprietor were capable of signing this statement of expenditure he ought not to be excused from doing it. But it becomes altogether different when, from no act or default on his part, his subscription became an actual impossibility.

I, therefore, humbly advise your Lordships that, as regards the second appeal, the foundation for it altogether fails, and I would suggest that it ought to be dismissed with costs. As regards the first appeal, if your Lordships concur with me you will vary the

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interlocutors to the extent which I have mentioned, namely, as to the £5200. Probably your Lordships will think it right that nothing should be said with regard to the costs of that appeal.

LORD WESTBURY:—

My noble and learned friend on the woolsack has expressed so fully and so clearly the grounds on which I think your Lordships' concurrent opinion will be founded, that it is unnecessary for me to follow him in detail. Upon the first point, that of finality, if we were to listen to the argument of the Appellant, the Act of 10 Geo. 3 would certainly be deprived of its utility, and would fail to attain the purpose for which it was passed. Its object unquestionably was to ascertain and settle, once for all, the amount of the expenditure, and the manner in which that expenditure was made. Accordingly it proceeds upon two principles, first, that the act of the heir of entail shall be considered, without the necessity of judicial inquiry, as conclusive upon the heirs of his body; and then, with regard to all those who are interested in the ulterior destination, it imposes upon the heir of entail the obligation of calling into Court the person first entitled, but it opens the door for all those who are entitled under the ulterior destination to come in and make themselves parties to the cause. But although that is my opinion with regard to the effect of the enactment, I am very desirous of pointing out that the full extent of your Lordships' judgment will only carry this proposition, namely, that the decree is final against the person claiming as heir of the body of the heir of entail who was called in that proceeding, because the father of the present Appellant was called in that proceeding. It is perfectly consistent with natural justice and with the words of the statute to hold that the proceeding was final against the person called and those who claim under him, namely, the heirs of the body, just in like manner as the statute does not impose upon the heir of entail making the improvements any obligation to call his own issue in the proceeding under the Act.

With regard to the next point, namely, the form of the decrees, it is perfectly clear that if a decree, which otherwise might have been final, is expressed in terms that shew conclusively upon the face of it that it is not in conformity with the statute making it

final, the Court may decline to enforce it. But that cannot be asserted of the decrees in the present case, because they all profess to be (and credit must be given to their statements) in strict conformity with the provisions of the statute; and no obligation being thrown upon the Court of embodying in the decree a statement of the improvements that were actually effected, the decree is in conformity with the ordinary style of the Court, and it is impossible, consistently with the provision that the decree shall be final, to permit a party to say that *ex facie* of the decree it is a decree that ought not to be held final. Credit must be given to the language of the Court, unless it is perfectly clear from the language itself that the Court is mistaken in the decree which it has made.

The next point arises upon the concurrent remedies which are given by the two statutes to the heir of entail. By the old statute, the *Montgomery Act*, no proceeding could be taken by the proprietor making the improvements for the purpose of raising money during his own life; but at the time of the passing of the *Rutherford Act*, in conformity with later usage, it was seen that it would be beneficial to give to the proprietor the power of raising money to a certain extent during his own life to repay part of the expenditure which he had made. And accordingly it gave him an option of adopting a different remedy from that provided by the *Montgomery Act;* the remedy under the *Rutherford Act* being this, that he might get authority either to make a mortgage for a certain amount, or to grant a rent charge issuing out of his estate for a certain limited amount. But it is clear that of the two alternatives one must be taken by the party. That is clear from the language of the statute, and by attending to the argument *ab inconvenienti*, independently of the language of the statute, we shall be led to the same conclusion. For it is scarcely possible to make a remedy given by one statute applicable to a portion only of a sum of money, and to leave the remedy given by another statute fully competent to the party with respect to the remaining part of the sum. A particular reason in illustration of this point was given by the counsel for the Appellants, namely, that the aggregate sum stated in the application of the late Marquis under the *Rutherford Act* was a sum constituted of items with regard to which there were different rights and remedies

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under the *Montgomery Act*, and that if you take out of that aggregate sum another sum, namely, £20,000, you render it impossible to ascertain with anything like certainty how much of the remaining £5000 was to be attributed to that outlay in respect of which there was a more restricted right, and how much was to be attributed to the outlay in respect of which there was the larger right under the *Montgomery Act*. I have no hesitation, therefore, in acceding to the conclusion of my noble and learned friend that it is a case of election—necessarily so by reason of the inconvenience attending any other course—and that the late Marquis here did make his election, for in his petition under the *Rutherford Act* he expressly desired that the whole of the outlay should be dealt with under the provisions of that statute, and the Court accordingly interposed its authority to the extent of that prayer.

With regard to the remaining point, unquestionably its determination admits of very little difficulty. The statute that gives the remedy gives the right, and constitutes the proprietor making the outlay a creditor of the estate. The *Montgomery Act* is most definite and precise. It is there enacted positively, and without reference to any subsequent provision, that a party doing so and so shall be a creditor to the succeeding heirs of entail for three fourth parts of the money laid out. That constitutes his right; the collateral provision contained in the 12th section (for it is in reality collateral) is consistent with this view, that though he has got this right, yet the enforcing of it shall be subject to the obligation of first complying with the direction contained in the 12th section, provided he is not upon any legal ground discharged from that obligation. If the proprietor is alive, before he can sue for the money for which he is made a creditor he must shew that he has lodged the accounts required by the 12th section, and that those accounts were subscribed by him. But if it be impossible for him to fulfil that requisition, not by reason of his own default, or his own act, why then there are benignant maxims well known to the law, and constantly acted upon, such as *Nemo tenetur ad impossibile* and *Actus Dei nemini facit injuriam*. And in such a case as this the subscription of the accounts by the personal representatives of the party must be held to satisfy the obligation. The only question is, whether there is any impedi-

ment to the recovery of the debt for which he is constituted a creditor by reason of there being a non-compliance with this provision, and if that compliance is shewn to have been rendered impossible, not by his neglect, or in consequence of his own act, but by the act of God, it would be impossible, consistently with the established principles of law, to hold that he has lost his right through a provisionary or directory clause which it was impossible for him to comply with.

My Lords, on all these grounds, therefore, I assent, without going further into the reasons already so fully given, to the conclusion proposed by my noble and learned friend. The Appellant succeeds upon one point, merely limited to a declaration that the House is of opinion that the remedy in respect of the £5200 was sought by the party under the *Rutherford Act*, and that he made an election which renders any resort to the *Montgomery Act*, the Act of the 10 Geo. 3, no longer competent to him. Upon all other points, I think the Appellant must be considered to have failed entirely—as well upon the technicalities of the matter as upon the merits and justice of the case. Therefore, the second appeal will be dismissed, and in the first appeal the interlocutors will be varied by a declaration.

LORD COLONSAY:—

My Lords, upon the question of finality I cannot say that I have at any time in the course of the discussion of this case had any serious difficulty. It appears to me that the argument, in the broad shape in which it was contended for by the Appellant, is not only a novel argument, but one that would go far to destroy the beneficial object and effect of the Act of 10 Geo. 3. It seemed to be contended that the finality could only extend to the person who had notice and was called in the course of the proceedings. The statute has been in operation for about a century, and I have not known any case in which the same contention was seriously maintained. In the circumstances of this case it happens that the party who is the Appellant here is the heir of the body of the party who got the notice—he is his heir of line. But although that circumstance occurs in this case, I do not wish that my opinion should be rested upon it. I am not at all prepared to say

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that there is any important distinction between the case of an heir succeeding to the estate in virtue of the entail, being the immediate descendant of the person who got the notice, and the case of any other heir of entail claiming the estate through the instrument, through which alone either party can obtain the estate. And I think there are several clauses in the Act of 10 Geo. 3, which place all heirs succeeding to an estate by virtue of an entail, from whatever distance of propinquity they may come, precisely in the same position as to obligations. It is not necessary in this case to decide that point, but I wish to guard against my opinion being supposed to be rested upon the limited ground that this party is the immediate descendant of the person who got the notice.

Then, my Lords, as to the form of the decrees, I see no difficulty. I think, on looking at the whole procedure that has taken place, the Court must be presumed to have had their minds sufficiently directed to the form; and they have given decrees which state that the expenditure has been made, and that the party is entitled to a certain proportion of that expenditure—all "conform" to the Act of Parliament. The improvements made were those prescribed or contemplated by the Act of 10 Geo. 3. The basis of the application to the Court was, that they were improvements of that description; and it must be presumed that when the Court pronounced that decree, they pronounced it conformably to the Act of Parliament. It appears also, with respect to the proceedings under the *Rutherford Act*, in which the parties interested, the heirs of entail, were called, and a decree was pronounced, that in the very decree which these parties had every opportunity of opposing, the improvements are described as improvements of the nature contemplated by the 10 Geo. 3.

Then comes the question, which has always appeared to me to be the only real question, and a somewhat difficult question, in this case, namely, whether the Marquis of *Breadalbane*, having availed himself of the provisions of the *Rutherford Act* in regard to the whole of that large sum, his representatives are entitled now to recur to the Act of the 10 Geo. 3 to render effectual the charge for a certain portion of that sum which was not covered by the bonds of annual rent or dispositions in security that were granted. I have had considerable difficulty upon that question; and when

supposable cases are put, as they have been, the difficulty appears greater than it does at first sight. Dealing as we are now with that question, I believe for the first time, in interpreting this Act, and, looking at the whole of the provisions of the statute, and weighing the inconveniences which would attend the construction contended for by the Respondents (which have been pointed out now more forcibly than they were when the case was before the Court below), I think that the construction that is proposed by the noble and learned Lords who have spoken already is perhaps, on the whole, the most reasonable construction of the statute; and, looking at it in that light, I am disposed to concur in the judgment upon that point also.

As to the non-signing of the accounts, I really have never felt any difficulty at all. I think it would be a very extraordinary construction to hold that where literal compliance with the direction of the statute has been prevented by the death of the party, that event should destroy the right of the creditor to the recovery of his expenditure. The statute directs that the accounts shall contain the whole of the expenditure up to a particular date; and therefore contemplates that they shall not be lodged or signed till that date has come; and if one or two days before the arrival of that date the party dies, being a creditor for that expenditure so far as it has been just and proper, it would be a singular construction of that direction to hold that those who come in and succeed him as creditors should not be entitled to supply what his death prevented from being done, and that they should consequently be deprived entirely of the right of recovering what is due to them. Therefore, upon all the points, I quite concur in the judgment proposed by your Lordships.

Mr. *Mellish*:—Will your Lordships allow me, before the question is put, to call your attention to the question of costs?

LORD WESTBURY:—When the counsel for a party considers that there is any question of costs to which he wishes to address himself, he must make it part of his original argument. If we were to hear you now there might be a long argument, for the other side would have a right to reply.

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THE LORD CHANCELLOR:—

In the first appeal, the interlocutors complained of will be varied by a declaration that the late Marquis of *Breadalbane*, by presenting his Petition under the Act of 11 & 12 Vict. c. 36, and the proceedings thereon, elected to adopt the remedies given by that statute, and to abandon the remedies given by the Act of 10 Geo. 3; and, therefore, assoilzieing the Defender from the operation of the summons as to the sum of £5202, but without prejudice to any question in any other action; and any costs paid by the Appellant under those interlocutors to be repaid. And on the second appeal, that the interlocutor complained of be affirmed, and the appeal dismissed with costs.

Solicitors for the Appellant: *Loch & Maclaurin.*
Solicitor for the Respondents: *John Graham.*

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*April* 3.

A. W. F. ALEXANDER . . . . . APPELLANT;

THE OFFICERS OF STATE FOR SCOTLAND . . . . . } RESPONDENTS.

*Claim to extensive Territories with Titles of Nobility and Royal Prerogatives—Challenge by the Crown.*

On the strength of an *ex parte* service and retour (1) the Appellant claimed extensive territories in *North America*, with three peerages, and powers of government, &c., under grants from *James* I. and *Charles* I. Suit on behalf of the Crown to reduce and set aside the service and retour. Judgment for the Crown, on the ground that the evidence was insufficient to sustain the alleged heirship.

*Right of the Crown to reduce a Service.*

The Sovereign, though not ordinarily entitled to oppose or to compete in a service, may impeach its validity and demand its reduction where the rights of the Crown or the interests of the state are likely to be compromised.

*Per* LORD WESTBURY:—I consider it clear, beyond the possibility of doubt, that there is competency in the Crown to maintain this action. The

(1) A service and retour in Scotch law correspond with the ancient *inquisitio post mortem* of English law; the object being to ascertain by the verdict of a jury the true heir of an ancestor deceased. See 2 Black. Comm. p. 69.

question is not as to a right to compete in the service, but as to a right to reduce it.

*Per* LORD COLONSAY :—The Crown has a perfect title to pursue this action.

*Onus Probandi.*

The *onus probandi* in suing for the reduction of a service is on the Pursuer.

*Suspicious Evidence.*

Circumstances of suspicion under which additional evidence tendered by the Appellant was rejected, and an application to make out the case by further proof was refused.

*Oppressive Course taken by the Officers of State.*

Suspension of the civil suit: institution of criminal proceedings. Disapprobation expressed by Lord *Chelmsford.*

*Appeal against an Interlocutor acquiesced in, and not reclaimed against.*

A preliminary defence which, if sustained, would have prevented examination of the merits, was repelled by the Lord Ordinary, whose interlocutor, moreover, stated the Defender's acquiescence. The Court afterwards gave judgment on the merits against the Defender, who appealed to the House of Lords—appealing also against the Lord Ordinary's interlocutor :—

*Held*, that the appeal against the Lord Ordinary's interlocutor was irregular and incompetent.

*Per* LORD CHELMSFORD :—The Appellant relies on the proviso in the 15th section of the 48 Geo. 3, c. 151, "that when a judgment or decree is appealed from it shall be competent to either party to appeal to the House of Lords from all or any of the interlocutors that may have been pronounced in the cause, so that the whole, as far as is necessary, may be brought under the review of the House of Lords." The interlocutor of the Lord Ordinary, repelling the preliminary defences, having, by the acquiescence of the Defender, and the absence of all notice of it afterwards, been virtually withdrawn from the cause, it could not be "necessary" upon the appeal from the final interlocutor upon the merits to bring it under the review of your Lordships' House.

*Per* LORD COLONSAY :—The proviso applies to judgments of the Lord Ordinary only so far as "necessary" to enable this House to deal with the merits of the case. The purpose of bringing up this interlocutor is to exclude us from doing so.

*Costs.*

*Per* LORD CHELMSFORD :—The 19 & 20 Vict. c. 56, s. 24, allows costs to be given for or against the Crown, and applies as well to all causes presently depending as to those which shall come to depend.

IN 1621 King *James* I., with a view to the "plantation of a colony," granted to Sir *William Alexander*, his heirs and assigns, vast territories in *North America*, comprising *Nova Scotia* and a great part of *Canada*, with the power of conferring honours, offices, and titles at his pleasure. In 1625 this grant was confirmed by King *Charles* I.; who further, in 1630 and 1633, reciting

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the success of Sir *William Alexander* in establishing "a colony in those *Atlantic* regions," created him Viscount and Earl of *Stirling*, Viscount of *Canada*, and Lord of *Tulliebodie*, "to him and his heirs male for ever."

These grants, confirmed by statute (1), were, as remarked by Lord *Westbury*, "things truly surprising and unheard of; being no less than a delegation of royal prerogatives to a subject, with powers of government extending over land equal in dimension to some kingdoms."

The first Earl of *Stirling* died in 1640, the last in 1739; and it would appear that nothing, or little, was afterwards heard of the family till 1830 and 1831, when *Alexander Alexander*, the father of the above Appellant, got himself served *ex parte* as nearest lawful heir in general and in special to the first Earl of *Stirling*, whom he described as his great-great-great-grandfather, and whose titles and prerogatives, under the grants of the *Stuart* princes, he forthwith assumed.

In 1833, however, the Officers of State for *Scotland* instituted, on behalf of the Crown, an action in the Court of Session to have the Services, both general and special, obtained by *Alexander Alexander*, and the retours, precept, and instrument of seisin, procuratory of resignation, and all other documents connected therewith, reduced and set aside on the ground that he was not, as he alleged, the nearest lawful heir of the Earl.

Styling himself Earl of *Stirling*, *Alexander Alexander* put in the following preliminary defences:—

The summons does not set forth any interest on the part of the Officers of State which entitles them to prosecute the present action.

Without entering at present into any discussion on the merits of the action, the Defender submits that the summons ought to be dismissed, on the following preliminary pleas:—

1. No one can challenge a service as heir, unless he claim to be served in the same character with the party whose service is sought to be reduced; and the Pursuers have not set forth in their summons, and they do not pretend, that they are in any way related to the first Earl of *Stirling*, or that they have any claim which, in a question of service, could come in competition with the Defender's.

2. It is not set forth in the summons that the Pursuers have any interest in the lands, entitling them to reduce the deeds challenged, and in truth they have no such right or interest, even supposing that the titles of the Defender were defective, and his services inept.

(1) Scotch Act, 1633, c. 28.

3. So far as the summons relates to the honours and dignities of the Earldom, it is clearly incompetent, the Court of Session having no original jurisdiction to decide any peerage question.

On the 3rd of July, 1833, the following interlocutor was pronounced by Lord *Moncreiff*:—"Repels the preliminary defences and decerns; and, *the Defender acquiescing in this judgment*, assigns the 1st of November to satisfy the production."

In addition to the evidence had upon the services, the Court issued a commission; and thereupon further evidence was adduced by both parties, the Defender endeavouring to establish his heirship by documents and inscriptions, as well as by oral testimony. While the Pursuers, on the other hand, impeached his case throughout as one wholly undeserving of reliance.

On the 20th of December, 1836, Lord *Cockburn*, after consideration of the evidence adduced by both parties, pronounced judgment as follows:—

Finds that the Defender has not established that the character of lawful and nearest heir in general or in special to *William* first Earl of *Stirling* belongs to him, or that his services as such are warranted by the evidence produced, either before the jury or in this action. Therefore reduces the said two services, general and special, and the retours proceeding thereon, and decerns.

The Defender reclaimed to the Inner House; and subsequently moved for permission to prosecute inquiries as to certain papers which he alleged had come to his knowledge. In November, 1837, he lodged a minute stating that he had recently obtained important additions to his evidence, especially two pacquets called the *De Porquet Packet* and the *Le Normand Papers*. The minute further stated that a map of *Canada* had been recovered, and a number of ancient writings relating to the *Alexander* family; with a memorandum in the handwriting of *Louis* XV. The Court allowed these documents to be produced, reserving all objections.

At this stage the Pursuers submitted that it was essential to the ends of justice that the Defender should be personally examined in presence and under the authority of the Court with reference to his alleged discovery of the documents tendered by him.

In pursuance, therefore, of an interlocutory order he appeared in Court, and was examined (1) with great strictness.

(1) See 2nd Series Court of Session Cases, vol. i. p. 1196, where the declarations of the Defender are given.

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A remarkable proceeding afterwards took place:—The Defender was cast into prison, and was indicted and tried in April 1839, upon the charge of having forged the documents in question. The jury, however, found it "not proven that he had forged any of the documents, or uttered them knowing them to be forged."

The cause was then put in the paper of the Inner House for judgment upon the Defendant's reclaiming note; and on the 9th of July, 1839, the Second Division gave judgment as follows: "In respect that no appearance is made for the Defender, adhere to the interlocutor complained of, and refuse the desire of the note."

Against this decision, and against the decision of Lord *Cockburn*, the Defender, on the 27th of August, 1841, appealed to the House; but in consequence of proceedings below, which are explained in the Third Series of the Court of Session Cases (1), the final hearing and disposal of the cause was suspended, and, the Appellant himself in the meantime dying, his appeal became abated.

On the 28th of June, 1864, his son, the above Appellant, *Alexander William Francis Alexander*, styling himself Earl of *Stirling*, was sisted in the place of his father, the original Defender; and on the 19th of June, 1866, the Second Division pronounced as follows:—"In respect of the interlocutor of Lord *Cockburn* of the 20th of December, 1836, and of the interlocutor of the Second Division of the 9th of July, 1839, reduce the precept from Chancery, the instrument of seisin, and procuratory of resignation, libelled, and decern."

Against this judgment *Alexander William Francis Alexander* appealed to the House. He also obtained a revivor of his father's appeal, which had stood so long over.

The son's appeal not only brought up the judgment of the Second Division of the 19th of June, 1866, but also the interlocutor of Lord *Moncreiff* (pronounced thirty-five years previously) repelling the preliminary defences; and one question that arose was, whether that early interlocutor, which stated acquiescence, and which had never been reclaimed against, was appealable.

Sir *Roundell Palmer*, Q.C., Mr. *Anderson*, Q.C., Mr. *Wotherspoon*, and Mr. *Bompas*, appeared for the Appellant.

(1) Vol. iv. p. 742; and see Scottish Jurist, vol. xxxviii. p. 390.

The *Lord Advocate* (1), and Mr. *Scott*, appeared for the Respondents.

The following opinions exhaust the arguments in the case.

LORD CHELMSFORD:—

My Lords, on the 11th of December, 1838, the Second Division pronounced an interlocutor appointing the Defender to appear at the bar for the purpose of being judicially examined on the matters set forth in his minute, and as to how the documents tendered in process came into his possession or knowledge. The judicial examination took place on the 18th of December, 1838, when he was interrogated closely and at considerable length by the Lord Advocate. After this the civil proceedings were suspended for a time, in consequence of a step taken by the Pursuers of which I cannot refrain from expressing my disapprobation. The Defender having been exposed to a very searching examination as to the manner in which he became possessed of the alleged newly discovered documents, distinguished as the *De Porquet Packet* and the *Le Normand Papers*, and the officers of the Crown having extracted from him all the requisite information, on the 14th of February, 1839, caused him to be arrested and thrown into prison, his letters and papers to be seized and searched, and many of them to be carried away. A prosecution for forgery was afterwards instituted, and after a trial which lasted five days the jury returned a verdict of "Not proven."

But under the present appeal, my Lords, the first question which will have to be determined is whether the interlocutor of Lord *Moncreiff* repelling the preliminary defences can be brought under the review of your Lordships.

The Appellant relies on the proviso in the 15th section of the 48 Geo. 3, c. 151, "that when a judgment or decree is appealed from it shall be competent to either party to appeal to the House of Lords from all or any of the interlocutors that may have been pronounced in the cause, so that the whole, as far as is necessary, may be brought under the review of the House of Lords." It is clear to my mind that this proviso does not mean that when a judgment

(1) Mr. *Gordon*.

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or decree is appealed from, all the preceding interlocutors may, as a matter of course, be brought under review. The words, "as far as is necessary," are qualifying words, and, whatever their exact meaning may be, they exclude the idea of there being no exception to the generality of the proviso.

I do not think that the Appellant is entitled to bring the interlocutor in question under review. It was pronounced upon preliminary defences which were intended to prevent the Court from entering into the merits of the case. It is stated in Lord *Moncreiff's* interlocutor, that the Defender acquiesced in the judgment, which it was said in argument meant no more than that he presented no reclaiming note against it. But the statement could never have found its way into the interlocutor of the Lord Ordinary unless he had been informed of the Defender's intended acquiescence in his judgment. These preliminary defences were thus finally disposed of. For although in the Defender's defences upon the merits the very same objection was made to the right of the Pursuers to challenge the deeds sought to be reduced, no notice was taken of this objection by Lord *Cockburn* in his note, and he seems to have considered either that it was not competent to the Defender to raise the objection in his defences on the merits, as it had not been reserved under the Act of Sederunt (1), or that the question had been finally determined. Mr. *Anderson* laboured hard to prove that an objection to the title of a Pursuer was good, both by way of preliminary defence and also upon the merits. If this were so, then the Act of Sederunt enabling the Lord Ordinary to reserve all objections to the title till the cause should be heard upon the merits was quite unnecessary.

The Appellant seeks in this appeal to bring under review an interlocutor pronounced thirty-five years ago, on the ground that whatever may be the merits of the case, the Pursuers had no interest to question them, and consequently no title to institute the suit.

The Appellant's counsel lay some stress upon an admission made in the Respondent's case, when the former appeal was before the House, "that the judgment of the Lord Ordinary repelling the preliminary defences was completely brought by appeal before your

(1) Act of Sederunt of 11 July, 1828.

Lordships." But neither the present law officers for *Scotland* nor your Lordships can be bound by any such admission.

The interlocutor of the Lord Ordinary, repelling the preliminary defences, having, by the acquiescence of the Defender, and the absence of all notice of it afterwards, been virtually withdrawn from the cause, it could not be "necessary" upon the appeal from the final interlocutor upon the merits to bring it under the review of your Lordships' House.

The Appellant contends that the Crown, having had no title to oppose the service of the Appellant's father, cannot pursue a reduction of it after it has been retoured. But it by no means follows, because a party may have no right to intervene in a service, that if his right is at all affected by it he may not afterwards have an action of reduction. The cases cited by the Appellant, of *Forbes* v. *Hunter* (1) and *Cochrane* v. *Ramsay* (2), relate to appearances upon general and special services, and it may be admitted that the Crown could not have appeared upon the general service, and perhaps not upon the special service, though with respect to the latter service there may be some question. But if the rights of the Crown are at all affected by the Appellant's father having been served heir to the first Earl of *Stirling*, it cannot be but that there must be some mode of protecting these rights, and none can be suggested but that of reducing the services, if improperly obtained.

The effect of the special service of the Appellant's father as heir of the first Earl of *Stirling* was to clothe him with a *primâ facie* title to the extensive territories granted by the Crown in 1621 and 1625, comprising *Nova Scotia* and a great part of *Canada*, together with the power of conferring honours, offices, and titles, at his will and pleasure. It appears that the Earl exercised this right of conferring honours and titles by creating Sir *Claude St. Etienne* and his son Baronets of *Nova Scotia*, by patents of the 30th of November, 1629, and 30th of April, 1630; and in like manner, by patent dated the 17th of June, 1636, he created Sir *John Browne* a Baronet of *Nova Scotia*, which title is still enjoyed by his descendants. The Appellant's father, also, claiming as heir of the first Earl of *Stirling*, assumed to confer upon *Thomas Christopher Banks* the degree and style of Baronet, and bound

(1) Fac. Coll. 3 July, 1810. (2) Fac. Coll. 28 June, 1821.

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himself to resign 16,000 acres of land in *Nova Scotia* in favour of *Banks*, and to grant new infeftments of the same to him and his heirs male and assignees whatsoever.

Under these circumstances, it would indeed be strange if the Crown could not challenge the service which gives a colour of right to such large pretensions. However good the grants to the Earl of *Stirling*, confirmed as they were by an Act of the Scotch Parliament, may be, the Crown must be interested to prevent its prerogative of conferring titles and dignities from being claimed by a person who has no connection with the grants; and consequently it must have the right to question his service as heir to the original grantee, which gives him the pretence of a title. But it seems to me that the Crown has the right to sue the conclusions of reduction in respect of the service giving the Defender a *primâ facie* title to the extensive territories in *North America* which passed by the grant to the first Earl of *Stirling*. That grant proceeded from the favour of the Crown towards the Earl and his descendants, and it must surely be the right of the Crown to prevent its bounty being diverted into a different channel. Suppose the descendants of the Earl had expressly waived their right to oppose the service of the Appellant's father, or to pursue its reduction, would the Crown have been bound to recognise the title thus acquired, and permit a stranger to introduce himself into the succession? Possibly the Crown would have no right to intervene upon the ground of its eventual interest as *ultimus hæres*, although that interest might be seriously affected by the fee being taken up by any other person than the true heir. But, as pointed out by the Lord Advocate, the Crown has an immediate interest to protect the fee from the intrusion of a stranger, as it has a right of non-entry so long as the proper heir does not appear. For these reasons it appears to me that the Crown has a right to pursue the action for reduction of the services.

Having disposed of these preliminary matters, the first subject of consideration upon the merits is, whether the proof given before the jury in the proceedings of the service of the Appellant's father, together with the additional evidence produced in the cause, is sufficient to sustain the service.

A question was made as to the *onus probandi* in this case, the

Lord Advocate contending that it did not lie upon the Crown; but this appears to me to be incorrect. The action is brought for a reduction of services, and the Pursuers have to prove that the services ought to be reduced. The Defender is not put to his answer till a case is made out against him. The proper course of proceeding in a case of this kind would seem to be that the Pursuers should begin by attacking the proof adduced by the Defender before the jury upon the proceedings in the service, and establishing that there is no admissible evidence sufficient to sustain the verdict, and then bringing forward any counter proof he may have in opposition to the Defender's case; the Defender being at liberty to support his case by additional evidence. But the question of the order and burden of proof is immaterial, as the whole evidence is before your Lordships, upon which you are enabled to decide whether the interlocutor of the 19th of June, 1866, finally determining the cause against the Appellant, ought to be maintained (1).

It remains to notice, that the Second Division found "the party compearing liable to the Pursuers in the expenses incurred by them prior to the 2nd of June, 1840." The Appellant's counsel object to this interlocutor, on the ground that at the time when these expenses were incurred, the Crown neither paid nor received costs; but the 19 & 20 Vict. c. 56, s. 24, which allows costs to be given for or against the Crown, applies as well to all causes presently depending as to those which shall come to depend. The Court, therefore, was perfectly justified in finding the Defender liable to those expenses. But as the Lord Advocate agreed not to

(1) His Lordship bestowed a searching and penetrating criticism on the evidence adduced by the Appellant,—shewing its defects, and pointing out where it was fabricated,—and agreeing with Lord *Cockburn*, whose interlocutor, minutely examining the details, was adhered to by the Second Division, and ultimately affirmed by the House. Lord *Chelmsford's* remarks go over forty-one folio pages, deducing the conclusion "that the fabrication of one set of documents must necessarily throw considerable suspicion on the others." His Lordship entered into no examination of authorities, but expressed himself as quite clear that the Court below were right, under the circumstances, in refusing to receive further proof, and in finally determining the cause against the Appellant. Part of the evidence depended upon hearsay, as to which Lord *Chelmsford* observed that "it was not every kind of hearsay that could be admitted in such cases. It could only be hearsay proceeding from persons who had peculiar means of knowing the relationship of which they spoke."

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press for them, the interlocutor may be amended by striking out this part of it; and, with this alteration, I submit to your Lordships that this and the other eight interlocutors ought to be affirmed, and the appeal dismissed with costs.

LORD WESTBURY:—

My Lords, we are much indebted to my noble and learned friend for the very able manner in which he has analysed the evidence given and proposed to be given in this case, and I entirely concur in the conclusion at which he has arrived.

I trust there never will be an attempt again made to maintain that an interlocutor by which a preliminary defence of the complaining party was overruled in 1833 can be fitly reviewed in this House at the expiration of thirty-five years, when, in truth, it was originally agreed that the Defenders should "acquiesce" in the judgment, as the words of it express.

But, without relying upon "acquiescence" at all, I am clear that this interlocutor cannot be brought up.

My Lords, I consider it clear, beyond the possibility of doubt, that there is competency in the Crown to maintain this action. The question is not as to a right to compete in the service, but as to a right to reduce it. Now, is there not, having regard to the subject matter here, a plain right and duty, and therefore an interest in the Crown, to watch over the transmission of these great powers in order to prevent their coming into hands not entitled to exercise them?

The grant itself is something surprising and unheard of. There is delegated in terms (whether good or not in law is another question), but in terms there is delegated to a subject the right of exercising royal prerogatives, the right of dealing out grants of immense territory, and, I presume, the corresponding right of exercising all the powers and duties of Government over an extent of land equal in dimension to some kingdoms. My Lords, I entirely agree in the judgment which has been proposed by my noble and learned friend.

LORD COLONSAY:—

My Lords, before we arrive at the consideration of the merits in this case, it is necessary to see whether there is any obstacle in the

way. The Appellant objects to the title of the Pursuers, and the answer made is that the point is closed against him. The Lord Ordinary decided it against him. He acquiesced in the judgment of the Lord Ordinary, and it is not competent to him to appeal from that judgment.

The proviso so often referred to applies, I think, to interlocutory judgments of the Court, and to judgments of the Lord Ordinary, but it applies to them only so far as "necessary" to enable this House to deal with the merits of the action. Now, the purpose of bringing up this interlocutor is not to enable the House to deal with the merits of the action, but to exclude us from doing so. In the Court below this interlocutor was a final one. It could not be questioned in the Inner House after the procedure which had taken place before the Lord Ordinary. By an Act of Sederunt, having the force of an Act of Parliament, being made in pursuance of a statute, it is declared that the interlocutor of a Lord Ordinary repelling preliminary defences shall be final unless the party announces at the time that it is his intention to bring the judgment under the review of the Court. Now, this party announced that it was not his intention to bring the judgment under review of the Court, but that he acquiesced in it, and he did not appeal. Therefore that interlocutor was final in the Court below, and the question as to the title to pursue, I apprehend, could not again be revived. It was argued that it might be revived as a defence upon the merits, because it involved two elements—one which went to exclude satisfying the production, and the other which went to exclude the following out the cause to a favourable judgment for the Pursuer. But it was only a defence against satisfying the production inasmuch as it was a defence against the title to pursue. The question was as to the title to pursue, and that is the point that is concluded both by the Act of Parliament and the Act of Sederunt to which I have referred.

One case was cited as being an authority for reviving such a discussion in the Inner House after it had been disposed of by the Lord Ordinary, the case of *Mackenzie* v. *Houston* (1). But that case, so far from being in favour of the view contended for here by the Appellant, went on grounds antagonistic to it.

(1) 29 Nov. 1829, Sh. & D.

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My Lords, I entirely concur in the opinion which has been expressed by my noble and learned friends that the Crown had a perfect title to pursue this action. It was argued that no party can appear to oppose any general service who does not claim the same title which the party pursuing the service claims. That is not quite a clear point with reference to the interest of the Crown. But, assuming it to be so, it has no relevancy here. It is necessary for the Appellant to go a step further. After saying that he has obtained such a service, he must establish his pretensions to use that service against the interests and rights of another party, and he must shew that that other party, be it Crown or subject, has no right to sue a reduction against him. Here I think it is clear the Crown had a right and interest to sue on the grounds which have been stated by my noble and learned friend who last addressed the House, and therefore I hold that the objection to the title to sue has no good foundation.

We then get into an examination of the merits as appearing on the evidence. Into that subject I do not mean at all to go, because it has been so fully analysed by my noble and learned friend who spoke first, and by Lord *Cockburn* in the Court below. As to allowing any further inquiry, I think there has been enough of investigation already.

*Interlocutors affirmed.*

Solicitors for the Appellant: *Bischoff, Coxe, & Bompas.*
Solicitors for the Respondents: *Connell & Hope.*

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A. F. IRVINE OF DRUM . . . . . RESPONDENT. *March* 26.

*Vindication of an ancient Charitable Trust.*

Case in which it was *held*—upon the construction of ancient documents, and the exposition afforded by the conduct of parties—that an estate in fee simple absolute (now of the value of £500 a year) had been dedicated more than two centuries ago to charitable uses, and was still subject to the trusts of the original benefaction;—the bar of prescription, positive and negative, being excluded by the fiduciary relation established and acknowledged.

The judgment of the Court below, to the effect that the estate was the Respondent's, and that the charity was entitled only to a rent-charge of £63 6*s.* 8*d.* issuing out of it, *reversed*.

*New Scheme of Administration directed.*

The Court of Session having a jurisdiction as to charities similar to that of the Court of Chancery, the House directed that a new scheme of administration should be settled, suited to the alteration of circumstances occasioned by the reversal.

*An Account directed.*

The House directed that the Respondent should be decreed to account for all surplus rents and profits, including grassums, if any, that had come to his hands since the signetting of the summons, but not prior thereto.

*Costs.*

Order made that the Appellants' costs should be paid out of the funds to be received by virtue of the judgment of the House.

THE Appellants brought their action in the Court of Session to have it found and declared that they had the sole and exclusive beneficial interest in the lands of *Kinmuck*, in *Aberdeenshire;* and that the Respondent, his heirs and successors, had no beneficial right thereto or interest therein.

On the 2nd of December, 1863, the Lord Ordinary (1) found and declared that the Pursuers "were entitled to the whole beneficial interest in the lands of *Kinmuck*, and that their right had not been cut off, either by the negative or the positive prescription."

Against this decision Mr. *Irvine* reclaimed to the First Division of the Court of Session, who, on the 8th of February, 1866, recalled the interlocutor of the Lord Ordinary, and assoilzied the

(1) Lord *Kinloch*.

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Defender from the conclusions of the summons (1). Hence the present appeal to the House.

Mr. *Mellish*, Q.C., and Mr. *Young*, appeared for the Appellants.

The *Lord Advocate* (2), Sir *Roundell Palmer*, Q.C., and Mr. *Anderson*, Q.C., for the Respondent.

In the following opinions the arguments and grounds of decision are fully stated.

THE LORD CHANCELLOR (3):—

My Lords, the action in this case was brought by the Appellants, against Mr. *Forbes Irvine* of *Drum*, to have it declared that the lands of *Kinmuck* were mortified, as to the whole profits thereof, for the support of certain bursaries and scholarships in the University and Grammar School of *Aberdeen*, and that Mr. *Irvine* had had in those lands no beneficial interest, and no right other than that of a trustee, with the patronage of bursars and scholars.

Mr. *Irvine* admits that he is bound to make good an annual rent or payment of £1000 Scots for these bursaries and scholarships; but he contends that as to all the profits of the lands over and above £1000 Scots (4) a year he is absolute proprietor. The Lord Ordinary, by his interlocutor of the 2nd of December, 1863, adopted the view of the Appellants, and made a decree substantially in accordance with the conclusions of the summons. From this a reclaiming note to the First Division of the Court of Session was presented. A proof was allowed and led for both parties; and, finally, on the 8th of February, 1866, the Lord Ordinary's interlocutor was recalled and the Defender was assoilzied. Hence the present appeal to your Lordships.

The question mainly turns upon the construction of three documents, all of them more than 200 years old: the will of *Alexander Irvine* of *Drum*, dated 1629; a decree of the Court of

(1) The case is reported at great length in the 3rd Series of the Court of Session Cases, vol. iv. p. 392; and in the Scottish Jurist, vol. xxxviii. p. 259.

(2) Mr. *Gordon*.

(3) Lord *Cairns*.

(4) £83 6*s*. 8*d*. sterling.

Session of 1633; and a bond and deed of mortification made by Sir *Alexander Irvine*, his son, in 1656.

By Sir *Alexander Irvine's* will of 1629, he devised in these words:

For the maintenance of letters, I leave, mortifie, and destinate ten thousand pounds Scots money to the Provost, Baillies, and Council of *Aberdeen*, to be bestowed and employed by them upon land and annual rent in all time hereafter to the effect following, to witt: Three hundred and twenty pounds of the annual rent thereof to be yearly employed on four scholars at the grammar school of *Aberdeen*, for the space of four years, ilk ane of them four score pounds, and four hundred pounds to be paid yearly to other four scholars at the college of *New Aberdeen*, and students of philosophy thereat, ilk ane of them ane hundred pound during likeways the space of four years, and also I ordain to be given to other twa scholars who have passed their course of philosophy, being made masters, and are become students of divinity in the said New College, of 400 merks Scots money; viz$^{t}$., to each one of them twa hundred merks of the said annual rent during the space of four years also, and the odd twenty merks, which, with the deductions above specified, compleatt the said haill annual rents of ten thousand pound, I ordain it to be given to any man the town of *Aberdeen* shall appoint for ingathering and furthgiving of the said a'rent to the said is scholars as is above designed.

The only question upon the construction of this will arose upon the meaning of the words, "to be bestowed and employed by them upon land and annual rent." A suggestion was made that the conjunction between "land" and "annual rent" ought not to have been "and" but "or," according to the more correct version of the will. The parties, however, by their proceedings, have admitted the copy in print to be a true copy; and I own that it appears to me of but little consequence whether the will is taken as having the word "and" or the word "or." Accepting it as printed, it appears to me that the testator means nothing more than to give a double power of investing upon "land," whatever that may be, and upon "annual rent," whatever that may be, and does not mean to require the investment either to be upon both land and annual rent, or upon one subject-matter, which is to be described by the collective term of "land and annual rent."

As to the meaning, then, of these words, unless some technical signification were proved to be applicable to them, I should have thought beyond all doubt that a power to bestow and employ the money in question upon "land" was equivalent to a power to buy with the money land which would produce an income for the purpose of the charity, and that by the power to "bestow and

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employ upon annual rent," what was intended was the purchase of what we may term an annual rent issuing out of land, or an annual rent-charge, or an investment upon securities which would "produce an annual income," which in these documents, and in all documents of about the same date, appears to me to be a word used as synonymous with annual rent.

According to this construction, in my opinion, it would have been no breach of trust upon the part of the trustees who were appointed to execute this will, if, with the money the testator left, they had bought land producing rent, or bought a rent-charge issuing out of land and yielding to them a fixed definite annual sum; or if, in the third place, they had lent and employed the money upon securities of a personal character producing an annual income. The only difference between those several modes of investment and application would have been, that in the second and third cases the income would have been fixed and not capable of extension, whereas in the first case the charity would have become owner of the land bought, with the benefit of any increase, and with the risk of any diminution in the rental.

*Alexander Irvine* died in 1630. It is sufficient to say that his widow and son tendered the £1000 to the Provost and Bailies of *Aberdeen*, who appear to have been afraid that by receiving it they would place themselves under some obligation to have forthcoming from the very first the annual rent or payment of £1000 for the purposes of the charity. They demurred to receiving the money. The result was, that Sir *Alexander Irvine* lent it at interest, which he applied for some years in payment of the scholarships and bursaries mentioned in the will. Finally, in 1632, he raised an action in the Court of Session against the Corporation of *Aberdeen* praying a declaration as to what should be done with this bequest, and who should have the patronage of the bursaries and scholarships?

In the summons, two alternative modes of application of the fund were proposed, the first of which was thus stated:—

That the said ten scollars to whose behoove and use the said sum is left mortifeit, and destinat, be not altogether defraudit of the benefit thereof, necessary it is that it be fund and decernit be the Lords of Counsall and Session, that it sall be leesum to the said complainer to wair and bestow the said sum of ten thousand

pounds upon bying of land theirw^t upon sic easy pryces and conditions as may be haid theirfor, and the said lands to be boc^t thair^wt, maills, farms, and duties of the samen, to be mortifeit and destinat to the use of the said scollars proportionally and *pro râta* effeirand to the quantities of the a'rent of the said sum appoyntit to be paid to them be the said testament, and the yeirly rent, forfeits, and duties of the said lands to be boc^t and conquest with the said sum to be in place and satisfaction to the said ten scollars of the a'rents and profeits of the said sum in all time coming, in respect of the said provost, bailies, and counsall of the said burgh their refusal to resave the said sum.

That is the first alternative proposed by the summary. The second alternative was in these terms:—

Or otherways the said sum of ten thousand pounds in respect of the said Provost, Bailies, and Counsall of *Aberdeen*, their refusal theirof, aught and suld be employit and bestowit to the best behoove and weil of the said ten scollars as the said Lords of Session sall appoynt, in respect the said complainant is content to consign the samen in presence of the Lords to be employit as said is.

I do not think, my Lords, that any doubt can be entertained as to the meaning and purport of those two alternatives. I read the propositions made by Sir *Alexander Irvine* to the Court of Session, as being a proposal, first, to buy the land with the money, in the ordinary sense in which those terms are employed, at such prices as land could then be obtained for; and secondly, in the alternative, in case the first proposal was not accepted, that the Court of Session should say how and upon what security the money in question was to be employed, he being willing to consign or pay it over in the presence of the Court.

In this action thus raised the corporation did not appear; but from other papers in process it appears clear that they knew that the action was pending, and that they took an interest in its progress, and in the conclusions of the summons; and the ultimate decree bears evident traces of having been made by arrangement between the Pursuer and the Corporation of *Aberdeen*. That decree was in these words:—

The Lords of Council decrimis and ordainis the said Sir *Alex. Irving* of *Drum* to have retention and keeping of the said soume of ten thousand pund money without payment of annual rent or profet for the samen, until the feist and terme of Whitsounday, 1640, at the which term ordains him to provyde for the use of the said ten scollars and bursars sufficient well-halden lands for employing of the said sum of ten thousand pounds, worth in yeirlie rent to the soum of ane thousand pounds money, q̃lk lands salbe bocht and acquirit be him heritably, without

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reversion, to the use and behove foresaid, agains that term, w'out farther delay, according to the destination and mortification of the said latter will.

As upon the construction of the will it appears to me that no reasonable doubt can be entertained but that land might have been purchased without any breach of trust on the part of the trustees, so upon the construction of this decree it appears to me that, without doing violence to the words used, it is impossible not to arrive at the conclusion that the thing pointed out was the purchase of land in the ordinary sense of the term. That was what Sir *Alexander Irvine* had proposed to the Court; and the only difference between the proposal and the order of the Court was that, in place of the land being bought immediately, Sir *Alexander Irvine* was ordered to keep the money for seven years, and then to produce land, not so much as the money would purchase, but land actually of the value of £1000 a year, an arrangement which, of course, must have been made either altogether, or to some extent, with his consent, and by agreement between him and the corporation.

I am unable to agree with the view taken by the Court of Session that there was anything in this at variance with the will of the testator. But even if any doubt could be entertained upon that point, it appears to me that this, being a decree made in the presence and with the consent of the Pursuer (himself entitled to dispose of and to deal with the property as he thought fit), he would be bound by it, although the decree should turn out to be (as I do not think it does) a departure from the words and the power of the will.

Under that decree nothing, in point of fact, was done until the year 1656, when Sir *Alexander Irvine*, being the owner and in the occupation of the lands of *Kinmuck*, a deed of mortification was executed by him, which is the next document to which I will call your Lordships' attention.

The operative and important part of that deed recites:—

And seeing that I ever have been most willing to fulfill my said deceast father his latter will and testament anent the mortification and destination of the said sum of £10,000, and to obey the said decreet accordingly, whilk I have done hitherto since the term of Whitsunday, 1640, and have acquired the town and lands of *Kinmuck*, &c., whilk lands are worth in yearly free rent the sum of one

thousand pounds Scots money by and attour the feu-duties, teind duties, minister's stipend, and others, astrict furth thereof. Therefore and to the effect the said ten schollars and bursars may be paid yearly furth of the maills and duties of the said lands according to the division above written, I, the said Sir *Alexander Irvine*, my heirs and successors, have mortified, destinate, and appointed, and be thir presents for me and my foresaids, mortify, destinate, and appoint the above written lands, milns, and others foresaid with the pertinents, for the use and behoof of the said ten schollars yearly in all time hereafter, to the effect the maills, farms, and duties thereof, may be paid to them yearly for their maintenance, according to the divisions above written, with power to them, and their curators in their name, to uptake the maills, farms, and duties of the foresaid lands for that effect, suit, call, and pursue therefor, and all other things requisite to do and command, that I might have done myself before the making hereof; and that for implement and fulfilling of that part of my said deceast father's testament anent the mortification and destination of the said sum and Lords of Session their decreet above written.

Now, my Lords, two things are to be kept in view. In the first place, both by the recital and by the last words I have read, there is a clear and distinct intimation that the author of the deed had acquired the lands in question in obedience to a decree of the Court of Session, and that he was desirous of settling those lands for the purpose of implementing that decree, and, at the same time, complying with the testament of his father. But, if I am right in my construction of the decree and of the will, the consequence would be that this must be regarded as an expression of an intention to settle the land out and out as land bought for the purposes of the charity.

Passing from that which is stated as the motive and object of the deed to the words of mortification, they appear to me to point entirely in the same direction. I am unable in this, which I will term the operative part of the deed, commencing at the word "therefore," to find any word which limits the enjoyment to an annual sum of £1000. I find that the mails, farms, and duties are to be paid to the objects of the charity yearly for their maintenance, according to the divisions specified; and I find that there is power to them and their curators to uptake the mails, farms, and duties, and to sue and take every proceeding for that purpose. And although the object in the beginning is stated to be to the effect that the scholars of the University may be paid yearly the farms and the mails and duties of the land "according to the division above written," even there it is not stated that the object is

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that they may be paid £1000 yearly, but that they may be paid according to the ratio of division prescribed by the will.

If the deed had ended there, it would appear to me that no reasonable question could be raised upon its meaning or effect. It is only in the clause as to the warrant that any words have been found which raise a doubt as to the construction of this deed. The clause as to the warrant is as follows:—

> And to the effect the said ten schollars and bursars may be sufficiently secured in the said lands and others above written for payment to them, according to the division above written, of the mails, farms, and duties of the said lands yearly, *extending to the said sum of one thousand pounds yearly*, in all time thereafter, I bind and faithfully oblige me, my heirs and successors whatsomever, to make, seal, subscribe, and deliver to the said ten schollars, and their successors, all contracts, dispositions, &c.

Now the words relied upon here were, "extending to the said sum of one thousand pounds yearly." Those words may either be descriptive as a repetition of what had been stated in the earlier part of this deed, namely, that the lands were worth at that time £1000 a year, or they may possibly import a limitation of the warrant or the extent of the enjoyment of those lands. If the words are susceptible of those two constructions, it appears to me that, upon all sound principles of construction, your Lordships will adopt that interpretation of them which would be in harmony with the operative and leading part of the deed, and with the decree of the Court of Session, which this deed was intended to implement. Adopting that principle, I apprehend, my Lords, that you cannot do otherwise than read these words as simply containing a descriptive reference to the value of the lands, which, in the earlier part of the deed, had been stated to extend to the sum of £1000 yearly. To read the clause as a limitation of the warrant would be to subvert the meaning of all the earlier part of the deed, and do violence to the decree, which the deed was intended to implement.

I have further to remind your Lordships that there is no proof or suggestion that the lands in question at the time of the deed were worth more than, although they are said to have been worth as much as, £1000 a year. There is no suggestion or proof that at this time they were considered likely to rise in value; in point of fact, they appear for a long time not to have increased in value.

Therefore, looking at the probabilities of the case, it is highly improbable that the corporation would buy a rent-charge exactly equal to the whole rent of the land which was the security for it, the result of which would be, that the charity would lose if the value of the land fell, and would not gain if the value of the land increased. On the other hand, it is equally improbable that the landowner would grant over his land a perpetual rent-charge to this amount, without any power of redeeming that rent-charge, or of freeing his land from the burthen, if he looked forward to retaining the land himself as its owner.

I should have been of opinion that the documents to which I have referred were sufficiently clear to require no aid from contemporaneous exposition; but it appears to me that every person concerned in these transactions thought at the time that land could be bought, and legitimately and properly bought, under the terms of the will of *Alexander Irvine*. I will take the liberty of referring your Lordships very briefly to a few passages which appear to me to put this matter beyond doubt.

We find the town of *Aberdeen*, in a minute, saying that they refuse to receive the £1000 until they "agree with Sir *Alexander Irvine* upon some reasonable and equal conditions for settling and establishing the said sum on the heritable purchase of lands." Then we find in another minute that the corporation, "all in ane voce, resolved to refuis to receave the said soume on the conditionnes contenit in the said testament," namely, that they should be liable perpetually in all time coming to pay £1000 a year, but are willing to receive the same on condition "that the samen be laid vponn bank quher best employment may be had, and the annuall rent thereof to accress with the stok till the same amount to that proportitionne as may mak purches of heritabill landis extending in yeirlie rent to one thousand poundis." The corporation say, "moneyes can mack no suire nor constant rent unlesse the same be employit on heritable purches off lands; and ten thousand pounds will scarcelie mack conquese above fine hundreth punds of constant yeirlie rent, and so they could not receave the said soume upon conditionn forsaid." In a letter from the provost and bailies to their legal adviser, they say:—"We have offert to the *Laird of Drum* to accept of the moneyes,—so being he will be

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content that the same be sequestrat and employed on annuelrent till the annuelles might accress with the stock to such proportion as micht mak heretable purches of landis that wald pay ane thousand pundis of constant yeirlie rent." There the contrast is drawn in the most marked way between annual rent and the heritable purchase of land yielding rent.

An instance is given by the corporation of the mode in which they have dealt with another bequest, which they speak of as a fitting and proper analogy for the employment of the bequest in question. "Mr. *Patrik Copland* has giwin and mortifeit sex thousand merkis to a professor of divinitie in our college, quhilk alredie with the annualis is accresced to sex thousand poundis redie to be employit on the bying of landis, and a professor of divinitie already satled in our college who gettis for his stipend the annual rent thairof."

There is an instruction again to the legal adviser of the corporation:—"Ye sall altogidder refuis to accept of the moneyis but upon expres condition that we gett the absolute right of presentation and admission of the equal half of the bursares, to wit, tua grammariaris, tua studentis in philosophie, and ane student in divinitie, in regard of our perpetuall burden in managing of the moneyis and of sic landis *as sal be bocht thairwith;*" speaking of the management of the land to be purchased as that which would create a burthen and a trouble.

Finally, your Lordships have the conclusions of the summons of Sir *Alexander Irvine*, in which he proposes the buying of land at such easy prices as it could be got for.

We have now, in the last place, to look very briefly at the subsequent history of the case so far as it throws any legitimate light upon the earlier transactions.

In 1676, in a proceeding for the augmentation of the minister's stipend, it was alleged, "for the Laird of *Drum*, that the lands of *Kinmucks* could not be burdened in respect the haill rent thereof was mortified to the College of *Aberdeen* for maintaining of bursars." The observation made upon that statement at your Lordships' bar, was that, in point of fact, the rent did not at that time exceed £1000, and therefore he might well say that the whole rent was mortified to the college. I should have thought that, to make

the statement consistent with the case of the Respondents, it should have been, not that the whole rent was mortified, but that the £1000 a year, which was more than the whole rent would produce, was mortified; but, in truth, you have no information upon which you can safely rely to the effect that the rent of the land at that time, before *Richarcharie* was sold, did not exceed £1000 a year.

In the year 1687 we find from an act by the Commissioners of the Treasury that the then *Alexander Irvine* had petitioned the Treasury, and had stated that the "deceased Sir *Alexander Irvine* had appointed the lands of *Kinmucks*, &c., and the whole rent of the said lands, for the maintenance of the bursars." A statement not that the whole rent was at that time being paid to the bursars, but that the testator, the said deceased Sir *Alexander Irvine* of *Drum*, the Petitioner's father, the author of the deed of mortification, had appointed the lands of *Kinmuck*, &c., and the whole rent of the said lands, for the maintenance of the bursars. A more clear and distinct declaration of mortification out and out could not be supposed.

In the year 1713 *Richarcharie* was sold, and the next document which your Lordships will probably deem of importance was in the year 1725. That is an act and factory in favour of *Thomson*. The only material portion of it is where there is excepted from the factory and Act the lands of *Kinmuck* destined for the payment of mortifications to schools and colleges. There the whole of the rent, and not any portion of the rent, is excepted from the factory.

Then your Lordships find a series of tacks of the lands, in which they are always termed the "burselands of *Kinmuck*," pointing to a complete mortification for a charitable purpose. And lastly, you have, in the year 1761, an account in process, recovered from the Defender by the Pursuers, of the rental in 1761; where upon the one side of the account the whole rental for the year is put down as £72 10*s.* 6*d.*, a sum less than £1000 Scots. And upon the other side you have this very remarkable entry. After stating all the payments that were made to the bursars and to the scholars, and that those payments amounted to about £66, you have credit taken by *Mary Irvine*, the factrix for the owner for the time being: "To balance for trouble and charge, £6 7*s.* 11½*d.*," a charge quite con-

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sistent with the position that the *Irvine* of that day was a trustee of the whole land for a charitable purpose, but entirely inconsistent with the idea that he was the owner of the land, and only liable to make good the profits thereof to the extent of £1000 a year.

My Lords, upon all these grounds I, speaking with great respect of the contrary opinion of the Lords of the Inner Division, can have no hesitation in advising your Lordships that the case of the Appellants has been made out, and that there is here demonstration that the whole of this land is at this moment devoted to the charitable trust contained in the will of the testator.

Something was said (though it was not much gone into in the argument) upon the question of prescription. All the learned Judges of the Court below, both the Lord Ordinary and the Judges of the Inner Division, were of opinion that that argument could not be maintained—that in point of fact, in the circumstances of this case, we have here a clear admission by the feudal owner of the land that there is a trust impressed upon the land; and the only question is whether the extent of that trust is greater or less. The doctrine of prescription has no real application.

As to an Entail which appears to have been made in the year 1821, it contains a provision that the heirs should "pay, perform, and fulfil all and whatever debts, sums of money, bonds, and all other deeds, due or contracted by the said *Alexander Irvine*, as effectually as if the said persons hereby called to the succession had been personally bound for the said debts and obligements." Therefore if even the mortification trust stood in the position of a personal contract, surely the heirs of entail taking the land would be bound, just as if they had personally engaged, to fulfil it. I do not desire to add upon the question of prescription any thing to the words used by the Lord Ordinary, in which, in my opinion, he has most satisfactorily disposed of the argument upon that point.

In conclusion, my Lords, I should propose to reverse the decision of the Court of Session, with a declaration that the whole of the rents and proceeds of these lands are devoted to the charitable purposes expressed in the will. But inasmuch as it appears that a change has taken place in the value of the lands, of course it would

be proper to require what we should term in this country a scheme, to be framed by the Court of Session, having regard to the increased value of the lands.

LORD CRANWORTH:—

It was ingeniously argued that on the face of the deed of 1656 it appears that the payment to the charity was not contemplated as a payment which would exhaust the whole rent, for in the prefatory words preceding those in which Sir *Alexander* mortifies the lands he speaks of the payments as payments to be made "furth of the maills," &c. But this seems to me an unwarrantable refinement; and even if the word "furth" might point to a surplus of rents after satisfying the objects of the charity, yet that is not its necessary meaning, and it is far too vague to override the language which follows, which does not include the word "furth," and which was clearly intended to exhaust the whole yearly proceeds of the lands.

An argument was also deduced by the Respondents from the subsequent part of the deed, whereby Sir *Alexander* binds himself and his heirs to do all necessary acts for procuring proper charters and other securities for confirming the title of those claiming the benefit of the charity. This, it was said, shews that nothing was considered as included in the mortification beyond the £1000 per annum. But I do not so understand this passage. Sir *Alexander* was bound to mortify lands which should be of the clear yearly value of £1000 Scots, which I agree must mean of not less than that sum. The mention of the value in this part of the deed was, I think, merely introduced, as it had been in the prior passage, "Whilk lands are worth in yearly free rent the sum of £1000 Scots money," for the purpose of making it appear on the face of the deed that the lands devoted to the charity were, in point of amount, such as were required by the decree—such, therefore, as exonerated Sir *Alexander* and his heirs from all subsequent liability. What the exact yearly value of these lands was at the date of the deed we do not know. Sir *Alexander* was not bound to mortify lands of a greater yearly value than £1000 Scots. But if he really understood that the land mortified was not at any time to be liable to a greater sum than £1000 Scots, I cannot but think that such a

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restriction on his liability would have been distinctly set forth, and not left to be discovered by subtle criticisms on words of doubtful meaning. This was a point of great importance, and which I think would not have been left doubtful. The plain import of the deed appears to me to be that Sir *Alexander* devoted the lands in question to the purposes of the charity in consideration of the £10,000 Scots which he had received, and that by so mortifying the lands, they being (as he alleged, at least) of the clear yearly value of £1000 Scots, he and his heirs became, for all time after, absolved from further liability.

LORD WESTBURY:—

This is a simple case, and it is matter of regret that it has been made the subject of a protracted litigation during seven years in the Court below. The words which form the substance of Sir *Alexander Irvine's* summons are very material, for he thereby desires, first, power to employ the money given in the purchase of lands; *such lands to take the place of the money;* secondly, he desires that the rents and profits of the lands so bought may be in place and satisfaction of the annual rents and profits of the sum bequeathed; and thirdly, he desires that the rents may be divided in the proportions prescribed by the will.

The decree of the Lords of Council and Session was that the executor and heir, Sir *Alexander Irving,* should retain and keep the £10,000, without payment of annual rent or profit for it, until Whit Sunday, 1640, when he was ordained to provide for the use of the scholars and bursars sufficient well-holden lands for employing the said sum of £10,000, worth in yearly rent of £1000 money, which lands should be bought and acquired by him heritably without reversion, to the use and behoof aforesaid, against that term without further delay, according to the will.

Thus an indulgence of several years was granted to the Pursuer, who engaged by the end of seven years to buy and provide lands worth annually £1000 at the least, and which lands were to be acquired to the use and behoof aforesaid; that is, to the use of the scholars and bursars.

It is contended that these words did not impose upon the Pursuer the obligation of doing more than granting an annual rent-

charge of £1000 per annum secured upon lands, or of conveying lands to the extent of that yearly sum and no more. But this construction cannot be maintained. The mention of the £1000 per annum was for the purpose only of fixing the minimum value of the lands to be provided.

This, then, was the obligation thrown on the Pursuer by the decree, which was in conformity with the submission made by himself in the summons. The question is, whether this duty has been fulfilled by the deed of mortification subsequently executed by the Pursuer. The deed of mortification was not executed by the executor, Sir *Alexander Irving*, until the 12th of April, 1656. And thereby after reciting the decree, and stating that he had ever been willing to obey it, which he had done since Whit Sunday, 1640, and that he had acquired the lands of *Kinmuck* and other lands, particularly described, and which are thereby stated to be worth in yearly rent the sum of £1000 Scots money, by and attour the feu duties, teind duties, minister's stipend, and others, therefore and to the effect the ten scholars and bursars might be paid yearly furth of the mails and duties of the said lands according to the divisions specified, he did mortify, destinate, and appoint the above written lands, &c. for the use and behoof of the said ten scholars yearly in all time thereafter. The plain intent and legal effect both of the decree and of the deed are, that Sir *Alexander Irving* having received considerable indulgence in point of time, was taken bound to convey, and does accordingly convey, lands being then of the value at least of £1000 per annum clear, to the use and behoof of the scholars and bursars, the rents being to be divided between them in the relative proportions of the sums directed to be paid to them under the will.

All that followed is in conformity with this construction. During several years the rents of the lands mortified were less than the sum of £1000, but the deficiency was not made good by the heirs and successors of the grantor, and when the rent of the lands afterwards increased and were likely to yield more than £1000 per annum, the device of taking grassums was resorted to for the purpose, apparently, of keeping the annual rents below the aforesaid sum.

The right of patronage has been constantly exercised by the heirs and successors of the grantor, and the payments that have been

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made are a distinct acknowledgment of the right of the scholars and bursars to the full benefit of the deed of mortification.

Since the decree of 1633 Sir *Alexander Irving* and his heirs must be considered as having become trustees of the charity in the room of the Corporation of *Aberdeen*, who declined to accept the trust; and there is no ground, therefore, upon which any right by prescription, either negative or positive, can be founded.

It is easy to see that Sir *Alexander Irving*, the executor, having been permitted to retain the principal sum for several years after the death of the testator without payment of rent or profit, might well have undertaken the duty of providing lands for the charity worth at the least £1000 per annum; but it is only necessary to ascertain that this is the legal effect of the deed of mortification. If it be, the charity is entitled to the full benefit of all the rents of the mortified lands. The annual payment intended for a collector to be appointed by the corporation was lost by the refusal of the corporation to accept the trust.

It will now belong to the Court of Session to make a new distribution of the augmented rents among the original objects, according to the proportion of their respective rights; but the allowance to each scholar and bursar must be limited by the purpose of the trust; which was to provide each bursar or scholar with a competent allowance for his education. If, after such an augmentation of the amount of the original stipends as the change of circumstances and of the expense of living would seem to require, there be a surplus left sufficient to endow other scholarships or bursaries, the surplus may, in my judgment, be so applied by the direction of the Court. Any new disposition or scheme of this nature will be subject to be modified or altered by any further order of the Court at a future time if required by circumstances. It is very desirable that the Court of Session, which has the same power and jurisdiction over trusts of this nature as are possessed by the Court of Chancery in *England*, should develop and exercise its authority in a correspondent manner.

I shall, therefore, humbly advise your Lordships to reverse the interlocutors appealed from; and by your order to declare that, according to the legal effect and true meaning of the deed of mortification, the whole of the lands thereby mortified and appointed,

and the entirety of the rents and profits thereof, are destined and given to the use and behoof of scholars and bursars aforesaid, and ought to be applied accordingly. And with this declaration I should propose to remit the cause to the Court below to settle a scheme for the proper management and collection of the rents of the lands now subject to the said deed of mortification, and the application of the net proceeds thereof, after deducting expenses, in augmenting the payments directed by the will in such manner as, having regard to the altered state of circumstances, shall be fit; with a declaration that the Defender, his heirs and successors, is entitled to the patronage of the scholarships and bursaries; and that he ought not to be decreed to account for or pay any of the surplus rents and profits of the lands over and above the sum of £1000 Scots, received by him prior to the date of the signetting of the summons, but to account for and pay in such manner as the Court shall direct all the rents and profits of the said lands (including grassums, if any) that have come to his hands since the signetting of the summons; the costs of the Appellants to be paid out of the funds that shall be received by virtue of your Lordships' order.

LORD COLONSAY:—

My Lords, I agree in the opinion that has been expressed by all my noble and learned friends, that there is here no ground for the plea of prescription. I also am of opinion that the deed granted in 1656 is obligatory upon the Defender, and that he can take no benefit from the circumstance that the further deeds which were then contemplated have never been executed. But still the question remains, what was the nature of the obligation so undertaken, and of the deeds so contemplated? Was it a disposal of the lands out and out? Or was it a grant of lands to the effect of securing in all time coming implement of the deed of the first Sir *Alexander Irvine*, so as to make payment of ten bursars of the sum specified in that deed? My noble and learned friends who have addressed the House entertain the former view, and in that view I think that the terms of the judgment which have been proposed are the proper terms. I may be permitted, however, with great deference to the opinions that have been expressed, to say that I doubt the

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soundness of that conclusion. My inclination is the other way. At the same time, I express that with the greatest deference, and I think it quite unnecessary to go into a statement of the circumstances which raised these doubts in my mind.

The following is the formal judgment of the House, as finally settled:—

It is ordered and adjudged, by the Lords Spiritual and Temporal, in Parliament assembled, that the interlocutor of the Lords of Session in *Scotland* of the First Division, of the 8th of February, 1866, complained of in the said appeal, be, and the same is hereby reversed: and it is hereby declared that, according to the legal effect and true meaning of the deed of mortification of the 12th of April, 1656, the whole of the lands thereby mortified and appointed, and the entirety of the rents and profits thereof, are destinate and given to the use and behoof of scholars in the college and school of *Aberdeen*, and ought to be applied accordingly; and, with this declaration, it is ordered that the cause be remitted back to the Lords of the First Division of the Court of Session in *Scotland*, with directions to settle a scheme for the proper management and collection of the rents of the lands now subject to the said deed of mortification, and the application of the net proceeds thereof, after deducting the expenses, in augmenting the stipends directed to be paid to the ten scholars by the will in the proceedings mentioned, in such manner as, having regard to the will and the altered state of circumstances, shall be fit; and it is further declared, that the Respondent is entitled to the patronage of the bursaries and scholarships that shall be so augmented, and that the Respondent ought not to be decreed to account for or pay any of the surplus rents and profits of the said lands over and above the sum of £1000 Scots, received by him prior to the date of the signetting of the summons, but that he should account for and pay, in such manner as the Court of Session shall direct, all the rents and profits of the said lands (including grassums, if any) that have come to his hands since the signetting of the summons; and it is further ordered that the costs of the Appellants be paid out of the funds that shall be received by virtue of these orders, declarations, and judgment; and that the said Court of Session should do further in the said cause as shall be just and consistent with the said orders, declarations, and judgment.

Solicitor for the Appellants: *James Dodds.*
Solicitors for the Respondent: *Connell & Hope.*

BELL . . . . . APPELLANT;

MRS. KENNEDY (THE APPELLANT'S DAUGHTER) AND HER HUSBAND, CAPTAIN HEW KENNEDY, *et al.* . . . . . RESPONDENTS (1).

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May 14.

*Domicile of Birth or Origin—Its Adherence and Tenacity.*

*Per* THE LORD CHANCELLOR :—The law is, beyond all doubt, clear with regard to the domicile of birth, that the personal *status* indicated by that term clings and adheres to the subject of it until an actual change is made by which the personal *status* of another domicile is acquired.

*Per* LORD WESTBURY :—The domicile of origin adheres until a new domicile is acquired.

*Per* LORD CHELMSFORD :—The onus of proving a change of domicile is on the party who alleges it.

MRS. *KENNEDY* and her husband claimed from her father (Mr. *Bell*, the above Appellant) her share of the parental "goods in communion," on the allegation that Mr. *Bell*, when his wife (Mrs. *Kennedy's* mother) died on the 28th of September 1838, had acquired a Scotch domicile, and so had become subject to the Scotch law as to *communio bonorum inter conjuges* (2).

Mr. *Bell's* defence was, that on the 28th of September 1838, when his wife died, he had not acquired a Scotch domicile; for that he had then retained unchanged his domicile of origin in *Jamaica*, where he was born, where he married, and where communion of goods between husband and wife was unknown.

The Second Division of the Court of Session, affirming the interlocutor of Lord *Kinloch*, decided that Mr. *Bell*, when his wife died, had become domiciled in *Scotland*, and, consequently, was liable to his daughter for her proportion of the "goods in communion."

The House of Lords disagreed with this ruling, and determined that on the day in question Mr. *Bell's* legal domicile was still in *Jamaica*, so that the question as to *communio bonorum* did not require examination.

(1) Reported 22 Dunlop, 269, and 3rd Series, Vol. i. p. 1127.

(2) That law is now repealed by the 18 & 19 Vict. c. 23, s. 6.

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Sir *Roundell Palmer*, Q.C., and Mr. *Cotton*, Q.C., were of counsel for the Appellant.

Mr. *Anderson*, Q.C., and Mr. *Mellish*, Q.C., for the Respondents.

The learned Judges below having been unanimous in their decision, and the reversal by the House being unanimous also, the opinions of the Law Peers are given at length; setting forth the facts minutely, and, by reference to the evidence and the arguments adduced, eliminating an important doctrinal correction.

THE LORD CHANCELLOR (1):—

My Lords, this appeal arises in an action commenced in the Court of Session, I regret to say so long ago as the year 1858; in the course of which action no less than sixteen interlocutors have been pronounced by the Court, all, or the greater part of which, become inoperative or immaterial if your Lordships should be unable to concur in the view taken by the Court below of the question of domicile.

The action is raised by Captain *Kennedy*, and his wife, the daughter of the late Mrs. *Bell;* and the Defender is Mrs. *Kennedy's* father, the husband of Mrs. *Bell.* The claim is for the share, said to belong to Mrs. *Kennedy*, of the goods held in communion between Mr. and Mrs. *Bell.* This claim proceeds on the allegation that the domicile of Mrs. *Bell*, at the time of her death on the 28th of September, 1838, was in *Scotland.* And the question itself of her domicile at that time depends upon the further question, what was the domicile of her husband? Her husband, the Appellant, is still living; and your Lordships have therefore to consider a case which seldom arises, the question, namely, of the domicile at a particular time of a person who is still living.

Mr. *Bell* was born in the island of *Jamaica.* His parents had come there from *Scotland*, and had settled in the island. There appears to be no reason to doubt but that they were domiciled in *Jamaica.* His father owned and cultivated there an estate called the *Woodstock* estate. His mother died when the Appellant was about the age of two years, and immediately after his mother's

(1) Lord *Cairns.*

death he was sent to *Scotland* for the purpose of nurture and education. By his father's relatives he was educated in *Scotland* at school, and he afterwards proceeded to college. His father appears to have died when he was about the age of ten years, dying, in fact, as he was coming over to *Great Britain* for his health, but with the intention of returning to *Jamaica*.

The Appellant, after passing through college in *Scotland*, travelled upon the Continent; and soon after he attained the age of twenty-one years he went out again to *Jamaica*, in the year 1823, with the intention of carrying on the cultivation of the *Woodstock* estate, which, in fact, was the only property he possessed. He cultivated this estate and made money to a considerable amount. He arrived at a position of some distinction in the island. He was the custos of the parish of *St. George*, and was a member of the Legislative Assembly. He married his late wife, then Miss *Hosack*, in *Jamaica* in the year 1828; and he had by her, in *Jamaica*, three children.

It appears to me to be beyond the possibility of doubt that the domicile of birth of Mr. *Bell* was in *Jamaica*, and that the domicile of his birth continued during the events which I have thus described.

In the year 1834 a change was made in the law with regard to slavery in the island of *Jamaica*, which introduced, in the first instance, a system of apprenticeship, maturing in the year 1838 into a complete emancipation. This change appears to have been looked upon by Mr. *Bell* with considerable disfavour, and, his health failing, in the year 1837 he determined to leave *Jamaica*, and to return to some part, at all events, of *Great Britain*. He entered into a contract for the sale of the *Woodstock* estate, the purchase-money being made payable by certain instalments; and in 1837 he left the island, to use his own expression, "for good." He abandoned his residence there without any intention at that time, at all events, of returning to the island. He reached *London* in the month of June, 1837. He remained in *London* for a short time, apparently about ten days, and he then went on to *Edinburgh*, and took up his abode under the roof of the mother of his wife, Mrs. *Hosack*, who at that time was living in *Edinburgh*.

I ought to have stated that while the Appellant was in *Jamaica*

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he appears to have kept up a correspondence with his relatives and friends in *Scotland*. In the year 1833 he acquired (I prefer to use the term "acquired" rather than the word "purchased") the estates of *Glengabers* and *Craka*. He appears to have taken to those estates mainly in settlement of a claim for some fortune or money of his wife secured upon them. It is apparent, however, that he had at no time any intention of residing upon *Glengabers*, and, in fact, the acquisition of those estates bears but little, in my opinion, upon the question of domicile, because in 1833, when he acquired them, his domicile, beyond all doubt, was, and for some years afterwards continued to be, in *Jamaica*.

He wrote occasionally at that time from *Jamaica*, evincing a desire to buy an estate at some future period in *Scotland*, if he could obtain one to his liking, and even an intention, if he could obtain such an estate, of living in *Scotland*, but nothing definite appears to have been arranged or said upon the subject; and, in fact, at this time other suggestions as to other localities appear to have been occasionally entertained and considered by him.

In these letters he frequently uses an expression that was much insisted upon at the bar—the expression of "coming home;" but I think it will be your Lordships' opinion that the argument is not much advanced, one way or the other, by that expression. It appears to me to be obviously a form of language that would naturally be used by a colonist in *Jamaica* speaking of the mother country in contradistinction to the colony.

Up to this point, my Lords, there is really no dispute with regard to the facts of the case. The birth-domicile of the Appellant in *Jamaica* continued, at all events till 1837, and the onus lies upon those who desire to shew that there was a change in this domicile, by which I mean the personal *status* indicated by that word,—the onus, I say, lies upon those who assert that the personal *status* thus acquired, and continued from the time of his birth, was changed, to prove that that change took place. The law is, beyond all doubt, clear with regard to the domicile of birth, that the personal *status* indicated by that term clings and adheres to the subject of it until an actual change is made by which the personal *status* of another domicile is acquired.

I do not think it will be necessary to examine the various definitions which have been given of the term "domicile." The question which I will ask your Lordships to consider in the present case is, in substance, this:—Whether the Appellant, before the 28th of September, 1838, the day of the death of his wife, had determined to make, and had made, *Scotland* his home, with the intention of establishing himself and his family there, and ending his days in that country? The onus, as I have said, is upon the Respondents to establish this proposition.

I will ask your Lordships, in the first place, to look at the facts subsequent to the return of the Appellant to *Scotland*, as to which there is no dispute, then at the character of the parol evidence which has been adduced, and, finally, at a few passages in the correspondence which is in evidence.

As regards the facts which are admitted, they amount to this:—The Appellant lived under the roof of Mrs. *Hosack* from the time of his arrival in *Edinburgh*, in the year 1837, until the 1st of June, 1838. He appears to have borne the whole, or the greater part of her house-keeping expenses during that time. He inquired for, and looked after, various estates, in the south of *Scotland* especially, and he indicated a preference for the estates of *Blairston* or *Auchindraine*, of *Mollance*, and of *Enterkine*. With regard to *Blairston* or *Auchindraine*, it does not appear, so far as I can discover, to have been actually offered to him for sale. With regard to *Mollance*, before he came to any determination as to it, it was sold to another person. With regard to *Enterkine*, at the time we are speaking of, the 1st of June, 1838, a negotiation had been going on by letters written between the Appellant and those who were proposing to sell the estate, but the offer which he ultimately made for it had at that time been refused, and, on the 1st of June, 1838, there was no pending offer on his part for the property. Mrs. *Bell*, his wife, at this time was expecting her confinement. The house of his mother-in-law, in which they were sojourning, was not sufficiently commodious for their wants, and the Appellant took for one year a furnished house in *Ayrshire*, called *Trochraigue*. He took it with no intention, apparently, of buying the estate, although it appears to have been for sale, but with the intention of living for a year in the house, and he hired

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servants for his accommodation. He removed to *Trochraigue* on the 1st of June, 1838, and, while so sojourning there, Mrs. *Bell* died in her confinement on the 28th of September in that year.

It appears to me, beyond all doubt, that prior to this time the Appellant had evinced a great and preponderating preference for *Scotland* as a place of residence. He felt and expressed a great desire to find an estate there with a residence upon it, with which he would be satisfied. His wife appears to have been even more anxious for this than he himself was; and her mother and their friends appear to have been eager for the Appellant to settle in *Scotland*. There is no doubt that, since the death of his wife, he actually has bought the estate which I have mentioned, the estate of *Enterkine*, and that his domicile is now in *Scotland*. All that, in my opinion, would not be enough to effect the acquisition of a Scotch domicile. There was, indeed, a strong probability up to the time of the death of his wife that he would ultimately find in *Scotland* an estate to his liking, and that he would settle there. But it appears to me to be equally clear that if, in the course of his searches, a property more attractive or more eligible as an investment had been offered to him across the Border, he might, without any alteration or change in the intention which he expressed or entertained, have acquired and purchased such estate and settled upon it, and thus have acquired an English domicile. In point of fact, he made more or less of general inquiry after estates in *England;* and a circumstance is told us by one of the witnesses, Mr. *Telfer*, which seems to me of great significance. Mr. *Telfer* says that his relations entertained great apprehension or dread that he would settle in *England*—a state of feeling on their part totally inconsistent with the notion that he had, to their knowledge, at that time determined ultimately and finally to settle in *Scotland*.

These being the admitted facts, let me next turn to the character of the parol evidence in the case. As to the evidence of the members of the *Hosack* family, and of the servants, very little is to be extracted from it in the shape of information upon which we can rely. They speak of what they considered and believed was the intention of the Appellant; but as to anything he said or did, to which alone your Lordships could attend, they tell us nothing

beyond what we have from the letters. As to the evidence of the Appellant himself, I am disposed to agree very much with what was said at the Bar, that it is to be accepted with very considerable reserve. An Appellant has naturally, on an issue like the present, a very strong bias calculated to influence his mind, and he is, moreover, speaking of what was his intention some twenty-five years ago. I am bound, however, to say, and therein I concur with what was said by the Court of Session, that the evidence of the Appellant appears to be fair and candid, and that certainly nothing is to be extracted from it which is favourable to the Respondents as regards the onus of proof which they have to discharge.

I will now ask your Lordships to look at what to my mind appears the most satisfactory part of the case, namely, the correspondence contemporaneous with the events in the years 1837 and 1838. I do not propose to go through it at length, but I will ask you to consider simply certain principal epochs in the correspondence from which, as it appears to me, we derive considerable light as to the intentions of the Appellant.

In the first place, I turn to a letter written by the Appellant on the 26th of September, 1837, three months after the Appellant and his wife had come to *Scotland*. He is writing from *Minto Street, Edinburgh*, to his brother-in-law, Mr. *William Hosack*, in *Jamaica*, and he says: "I have not got rid of my complaint as yet, and still find difficulty in walking much, and was obliged to forego the pleasures of shooting, on which I had so much set my heart. This country is far too cold for a person not having the right use of his limbs. In fact I have been little taken with anything, and would go to *Canada, Jamaica*, or *Australia*, without hesitation. I enjoy the fresh butter and gooseberries." Of the latter—that is, of the gooseberries—he proceeds to state some evil consequences which he had suffered, and then he says: "Everything else is as good, or has an equivalent fully as good, in *Jamaica*. My mind is not made up as to the purchase of an estate. Land bears too high a value in proportion to other things in this country, owing to the members of the House of Commons and of Lords being all landowners, and having thereby received greater legislative protection. The reform voters begin to see this, and as soon as the character of the House of Commons changes enough (and it

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is changing prodigiously) the value of land will come to its true value in the state. I have formed these views since I came home, and have lost in proportion my land-buying mania." Thus, having, as I have stated, a domicile by birth in *Jamaica*, and having come to this country with an indeterminate view as to what property he should become the purchaser of, writing three months afterwards, he says: "I have been little taken with anything, and would go to *Canada*, *Jamaica*, or *Australia*, without hesitation." Nothing can be more significant as to the absence of any determination in his mind to make *Scotland* his fixed home, and to spend the remainder of his days there.

I come to the 27th of December, 1837, when the Appellant, again writing to the same brother-in-law in *Jamaica*, says: "As to the country, I like none of it. I have not purchased an estate, and not likely to do so. I had my guns repaired, bought a pointer, purchased the shooting of an estate for £10, have never been there, nor fired a shot anywhere else. Have had a fishing rod in my hands only for two hours, and caught nothing. I bought a horse, and might as well have bought a bear. He bites so, it would have been as easy to handle the one as the other. I exchanged him for a mare, and, positively, I have sent her to enjoy herself in a farm straw yard, without ever having been once on her back, or even touched her in any way." Here, again, we find that so far from his expressing a liking for the country upon better acquaintance, he says he does not like it, and so far from a determination to purchase an estate in *Scotland* and end his days upon it, he says, "I have not purchased an estate, and am not likely to do so."

Passing over three months more, I come to a letter dated the 20th of March, 1838, by Mrs. *Bell*, the wife's expressions being even more significant than those of her husband; for it is obvious that she, of the two, was more inclined to settle in *Scotland*. She writes: "The extreme severity of the winter has put us a good deal out of conceit of *Scotland*, but independent of that, I don't find the satisfaction in it I anticipated. If circumstances permitted, I would not mind to return to *Jamaica*, though, I dare say, after being here a few years I might not like it. This country is so gloomy, it is sadly depressing to the spirits, so unlike what one

has been used to in dear, lovely *Jamaica*. The vile pride and reserve of the people is here too great a source of annoyance. A man is not so much valued on the manners and education of a gentleman as on the rank of his great grandfather—that is to say, among a certain class. You will perceive from this we are still at Number 9. *Bell* has several properties in view, but is as undetermined about where we may settle as when he left *Jamaica*. Next week he goes to *Ayrshire* to look at an estate, and from thence to *Galloway* and *Dumfriesshire*. If we don't fix very soon we purpose taking a furnished house in the country for twelve months." Now, the whole of this passage, I think, is of considerable importance, but the last sentence I have read affords a key which may be useful in letting us into the design of the spouses in taking the furnished house of *Trochraigue*. The interpretation given by this letter is, that it was equivalent to saying that they had not at that time fixed upon a residence.

I pass on for two months more. The offer which in the interval he had made for *Enterkine* had been refused. The furnished house at *Trochraigue* had been taken. The Appellant and his wife were upon the eve of taking possession of it on the 1st of June, 1838; and on the 28th of May, 1838, the Appellant writes to his brother-in-law in *Jamaica:* "I have taken a country house at *Trochrigg*." "I leave this for it on the 1st of June. It is situated two miles from *Girvan*, which is twenty miles west of *Ayr*, on the sea coast. Therefore for the next twelve months you can address to me *Trochrigg*, near *Girvan, Ayrshire, Scotland*. The offer which I wrote you I have made for *Enterkine* I received no answer to until sixteen days after, and then I got an answer stating they had a better offer. Of this I believe as much as I like, for I see it advertised again in the Saturday's paper. I do not know whether I shall make anything of this estate for the present, and I care not. It is still very cold, and if I do not make a purchase in the course of this year, I perhaps will take a trip next summer to the south of *France*, and see whether I don't find it warmer there." That is to say in the next summer, which would be the summer of 1839, he was in expectation that Mrs. *Bell* and his family would be able to accompany him to "take a trip to the south of *France*, and see whether he did not find it warmer there,"

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not, as it seems to me, for the purpose of enjoying a temporary sojourn, but, if he found it a more agreeable climate, for the purpose of making it his permanent residence.

There is only one other passage to which I would ask your Lordships' attention. It is in a letter written one month afterwards, while Mr. and Mrs. *Bell* were at *Trochrigg*, on the 16th of June. Writing to Mr. *William Hosack*, the Appellant says: "There are several gentlemen's seats in the neighbourhood, but none of them reside in them. We will probably have only three or four acquaintances, and shall be, in that respect, much the same as in *Jamaica*. We must, however, make the most of it for twelve months, in the hope that during that time I may be able to find some estate that will be suitable for me as a purchase."

I find nothing after this material in the correspondence before the death of Mrs. *Bell*, and the last sentence I have read appears to me to sum up and to describe most accurately the position in which the Appellant was at *Trochrigg;* he was there in the hope that, during the "twelve months," he might be able to find some estate which might be suitable to him for purchase; but upon that contingency, as it seems to me, depended the ultimate choice which he would make of *Scotland*, or some other country, as a place of residence. If his hope should be realized, we might from this letter easily infer that *Scotland* would become his home. If his hope should not be realized, I see nothing which would lead me to think, but everything which would lead me to doubt, that he would have elected to remain in *Scotland* as his place of residence.

It appears to me, on the whole, upon consideration of the facts which are admitted in the case, and the parol evidence, and the correspondence to which I have referred, that so far from the Respondents having discharged the onus which lies upon them to prove the adoption of a Scotch domicile, they have entirely failed in discharging that burden of proof, and that the evidence leads quite in the opposite direction. There is nothing in it to shew that the Appellant's personal *status* of domicile as a native and an inhabitant of *Jamaica* has been changed on coming here by that which alone could change it, his assumption of domicile in another

country. I am, therefore, unfortunately unable to advise you to concur in the opinion of the Court of Session. The Lord Ordinary entertained the opinion that the Appellant, from the first moment of his arrival in *Scotland*, and of his sojourn at Mrs. *Hosack's* house, had acquired a Scotch domicile. But nothing could be more temporary—nothing more different from the state of things that would lead to the conclusion of the assumption of a Scotch domicile—than the circumstances under which that sojourn took place. Lord *Cowan*, in delivering the opinion of the Court of Session, appears, on the other hand, to have thought that the Scotch domicile was not acquired at the time of arrival in *Scotland*, but was acquired at the time of taking possession of *Trochrigg*. But if we are to put upon the occupation of *Trochrigg* the interpretation which the Appellant himself put upon it at the time, so far from its being an assumption of a Scotch domicile, it appears to me to have borne an entirely different construction, and to have been a temporary place of sojourn, in order that a determination might be arrived at in the course of the sojourn as to whether a Scotch domicile should or should not ultimately be acquired.

There is one passage in the judgment of the Court of Session, delivered by Lord *Cowan*, to which I must ask your Lordships more particularly to refer, for it appears to me to afford a key to what I think, with great respect, I must call the fallacious reasoning of the judgment. After speaking of the parol evidence given by the Appellant, Lord *Cowan* uses these words: "For after all, what do the statements of the Defender truly amount to? Simply this, that prior to September, 1838, he had not fixed on any place of permanent residence, and had not finally made up his mind or formed any fixed intention to settle in *Scotland* before he bought *Enterkine*. There is no statement that he had it in his mind to take up his residence elsewhere than in *Scotland*." If, my Lords, I read these words correctly, Lord *Cowan* appears to have intimated that in his opinion it would not be enough to find that the Appellant had not fixed on any place of permanent residence prior to September, 1838, and had not decidedly made up his mind or formed a fixed intention to settle in *Scotland*, unless proof were also adduced that he had it in his mind to take up his residence elsewhere than in *Scotland*. I venture to think that would be an

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entirely fallacious mode of reasoning, and would be entirely shifting the position of the proof which has to be brought forward. The question, as it seems to me, is not whether he had made up his mind to take up his residence elsewhere than in *Scotland*, but the question is, had he, prior to September, 1838, finally made up his mind or formed a fixed intention to settle in *Scotland*. Lord *Cowan* appears to admit that the parol evidence itself would shew that that had not been done, and that parol evidence is, in my mind, fortified and made very much more emphatic by the evidence of the correspondence to which I have referred.

I have humbly, therefore, to advise your Lordships to assoilzie the Defender from the conclusions of the summons, and to reverse the sixteen interlocutors which have been pronounced by the Court below.

LORD CRANWORTH:—

The whole evidence has been so thoroughly examined by my noble and learned friend, that I feel that I should be rather wasting your Lordships' time if I were to attempt to go over again that which has been so completely exhausted by him.

That the Appellant's domicile of origin was in *Jamaica*, and that it so continued till the month of April, 1837, is not and cannot be disputed. His residence there was interrupted for his education, partly in *Scotland* and partly on the Continent; but to *Jamaica* he returned immediately afterwards; there he married, and there he had his family; there he set up his *lares*, and there he continued till April, 1837, and would probably have continued much longer, but that his health had began to fail. Then he returned to *England*—I say *England*—and it was really to *England*, because he landed at *Dover*:—he passed a few days in *London*, and then went directly down to his mother-in-law's house in *Edinburgh*; but after residing, as he did temporarily, with her for about nine months, it is plain that he found that he was not quite so much pleased with the country to which he had returned as he expected to have been; and I think, therefore, that his inclinations were shaken upon this subject.

On the whole, my Lords, I entirely agree with the conclusion arrived at by my noble and learned friend.

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LORD CHELMSFORD:—

My Lords, I agree with my two noble and learned friends, that Mr. *Bell* had not acquired a domicile in *Scotland* at the time of his wife's death in September, 1838.

This case being one of an alleged change of domicile, it is necessary to bear in mind that a domicile, although intended to be abandoned, will continue until a new domicile is acquired. And that a new domicile is not acquired until there is not only a fixed intention of establishing a permanent residence in some other country, but until also this intention has been carried out by actual residence there.

It may be conceded that if the intention of permanently residing in a place exists, a residence in pursuance of that intention, however short, will establish a domicile.

Mr. *Bell's* original domicile was *Jamaica*, and it is for the Respondents, who rely upon a change of domicile, to prove that such change took place. The change of domicile (if any) must be dated subsequently to April, 1837, when Mr. *Bell* turned his back upon *Jamaica*, and apparently with the intention of never returning to the island. The learned counsel at one time seemed disposed to argue that Mr. *Bell*, having a fixed intention of making *Scotland* his future residence, the moment he quitted *Jamaica* with that view he acquired a Scotch domicile. But as intention alone is not sufficient to constitute domicile, this argument was not much insisted upon. It was contended, with more plausibility, that if Mr. *Bell* left *Jamaica* with the intention of never returning, but of purchasing land in *Scotland*, as soon as he arrived in *Scotland* and set about this intention he acquired a domicile. I do not think, however, that there is sufficient proof of a fixed intention on the part of Mr. *Bell* to purchase an estate in *Scotland*, and not elsewhere, with a view to a permanent residence, until he became the purchaser of *Enterkine*, which was after the period when the Respondent's case requires that the domicile should be established. He was certainly upon the look-out (if I may use the expression) for a place in *Scotland*, and would no doubt have closed with any advantageous offer. But it seems to me to be equally clear that he was not so wedded to the idea of a residence in *Scotland* as that if anything more eligible had presented itself in *England* he

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would not have embraced it. To use his own expression upon his examination in the cause, he had "no fixed intention as to what he was to do for the future."

I think the Respondents have failed to prove Mr. *Bell's* intention to acquire a new domicile before the death of his wife on the 28th of September, 1838; and therefore that the interlocutor finding that he became domiciled in *Scotland* at this date ought to be reversed.

Lord Westbury:—

1 CLD 264
2 SCLD 538

My Lords, I have very few words to add to what has been already stated to your Lordships; and, perhaps, even those are not quite necessary.

What appears to me to be the erroneous conclusion at which the Court of Session arrived is in great part due to the circumstance, frequently lost sight of, that the domicile of origin adheres until a new domicile is acquired. In the argument, and in the judgments, we find constantly the phrase used that he had abandoned his native domicile. That domicile appears to have been regarded as if it had been lost by the abandonment of his residence in *Jamaica*. Now, residence and domicile are two perfectly distinct things. It is necessary in the administration of the law that the idea of domicile should exist, and that the fact of domicile should be ascertained, in order to determine which of two municipal laws may be invoked for the purpose of regulating the rights of parties.

2 PJM 446

We know very well that succession and distribution depend upon the law of the domicile. Domicile, therefore, is an idea of law. It is the relation which the law creates between an individual and a particular locality or country. To every adult person the law ascribes a domicile, and that domicile remains his fixed attribute until a new and different attribute usurps its place. Now this case was argued at the Bar on the footing, that as soon as Mr. *Bell* left *Jamaica* he had a settled and fixed intention of taking up his residence in *Scotland*. And if, indeed, that had been ascertained as a fact, then you would have had the *animus* of the party clearly demonstrated, and the *factum*, which alone would remain to be proved, would in fact be proved, or, at least, would result immediately upon his arrival in *Scotland*.

The true inquiry, therefore, is—Had he this settled purpose, the moment he left *Jamaica*, or in course of the voyage, of taking up a fixed and settled abode in *Scotland?* Undoubtedly, part of the evidence is the external act of the party; but the only external act we have here is the going down with his wife to *Edinburgh*, the most natural thing in the world, to visit his wife's relations. We find him residing in *Scotland* from that time; but with what *animus* or intention his residence continued there we have yet to ascertain. For although residence may be some small *primâ facie* proof of domicile, it is by no means to be inferred from the fact of residence that domicile results, even although you do not find that the party had any other residence in existence or in contemplation.

I take it that Mr. *Bell* may be more properly described by words which occur in the Digest; that when he left *Jamaica* he might be described as *quærens, quo se conferat, atque ubi constituat domicilium* (1). Where he was to fix his habitation was to him at that time a thing perfectly unresolved; and, as appears from the letters which your Lordships have heard, that irresolution, that want of settled fixity of purpose, certainly continued down to the time when he actually became the purchaser of *Enterkine*. But the *punctum temporis* to which our inquiries are to be directed as to Mr. *Bell's* intention is of an earlier date than that. The question is, had he any settled fixed intention of being permanently resident in *Scotland* on the 28th of September, 1838? I quite agree with an observation which was made in the Court of Session, that the letters are the best evidence in the case. To those letters your Lordships' attention has been directed, and whether you refer to the language of the wife's letters, or look exclusively at the language of the husband's letters written to his familiar friends or his relatives whom he had left in *Jamaica*, it is impossible to predicate of him that he was a man who had a fixed and settled purpose to make *Scotland* his future place of residence, to set up his tabernacle there, to make it his future home. And unless you are able to shew that with perfect clearness and satisfaction to yourselves, it follows that the domicile of origin continues. And therefore I think we can have no hesitation in answering the question where he was settled on the 28th of September. It must

(1) Dig. lib. 50, t. 1, 27.

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be answered in this way; he was resident in *Scotland*, but without the *animus manendi*, and therefore he still retained his domicile of origin.

My Lords, it is matter of deep regret, that although it might have been easily seen from the commencement of this cause that it turned entirely upon this particular question, yet we find that ten years of litigation have taken place, with enormous expense, and an enormous amount of attention to a variety of other matters, which would have been wholly unnecessary if judicial attention had been concentrated upon this question, which alone was sufficient for the decision of the case.

LORD COLONSAY:—

My Lords, while I do not differ from the judgment proposed, I cannot say that the case has appeared to me to be so very clear and free from difficulty as it has appeared to my noble and learned friends. I think it is a case of nicety on the evidence. But having gone over that evidence more than once with much care, and having listened to the whole of the able argument for the Respondents, I do not see any sufficient ground for rejecting the conclusion at which my noble and learned friends have arrived.

The principle of domicile is one which occupies a very prominent place in our law, and in the law of all civilized countries. It exercises an influence almost paramount in regard to personal *status* and rights of succession, as well as to political international relations. It has therefore necessarily undergone much discussion in all countries, and both in ancient and modern times. Yet there is perhaps no chapter in law that has from such extensive discussion received less of satisfactory settlement. That is no doubt attributable, in no small degree, to the nature of the subject, involving, as it does, inquiry into the *animus* of persons who have either died without leaving any clear record of their intentions, but allowing them to be collected, by inference, from acts often equivocal; or who, being alive and interested, have a natural, though, it may be, an unconscious, tendency to give to their bygone feelings a tone and colour suggested by their present inclinations.

I am not disposed to take the evidence of Mr. *Bell* as the corner stone of my judgment. I agree with the Respondents in

thinking that what Mr. *Bell* wrote at the time, and what he did at the time, are better materials and safer grounds for judgment than what he says now. And I should have been of that opinion even if his evidence had been less open to criticism, and less vulnerable than it is.

The case presents itself to my mind in this light. Mr. *Bell's* domicile was in *Jamaica*—not only his domicile by residence and property, and as being the seat of his mercantile pursuits and all his worldly interests, but also his domicile of origin. To this last I attach considerable importance, though I think that the measure of its importance on the question of evidence may be, and in this case is, modified by other considerations—such as the previous history of his family, and of his wife's family, and his own early associations by residence in *Scotland* for twenty years from childhood until manhood. Still I think the circumstance that *Jamaica* was the domicile of origin is not unimportant in this case, and especially on the question as to the extinction of that domicile.

Then I think it is very clear that Mr. *Bell* left *Jamaica* with the intention of never returning, or, as it is expressed in some of the letters, he left it "for good." I further think that his leading desire at that time, and for some time previously, was to acquire a land estate in *Scotland*, which would give him a desirable residence, and be at the same time a good investment for his money. This last was, I think, a *desideratum*, for it appears that he intended to invest in that way the whole, or nearly the whole, of his fortune, and was even disposed to borrow £14,000 or £15,000 to enable him to make such a purchase as he desired. But I do not think that his having sailed from *Jamaica* with that intent extinguished his *Jamaica* domicile. I know of no authority for that proposition. There are dicta to the effect that if *Scotland* had been the domicile of origin, and he had bid a final adieu to *Jamaica* and sailed for *Scotland*, and had died *in itinere*, the domicile of origin would be held to have revived; but there is no authority for saying that a person dying *in transitu* from the domicile of origin to a foreign land, had lost the domicile of origin. He could not so displace the effect which law gives to the domicile of origin, and which continues to attach until a new domicile is acquired *animo et facto*. He cannot have acquired a domicile in a new country which he has never reached.

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But Mr. *Bell* did reach *Scotland*—and there the difficulty of this case begins. His leading desire was to find in *Scotland* an estate such as he would be disposed to invest his fortune in. He arrived in *Scotland* in June or July, 1837. He immediately set about prosecuting inquiries as to estates, chiefly in *Ayrshire, Dumfriesshire,* and *Galloway*. Among these was the estate of *Enterkine*. For that estate he made an offer in 1838, which was refused. He made a higher offer in 1839, which was accepted. I have no doubt that from the date of that purchase he was to be regarded as a domiciled Scotchman. The leading desire with which he left *Jamaica* and arrived in *Scotland*, and which during two years' residence in *Scotland* he still entertained, had now been realized. He had found a property such as he had desired, with a mansion that suited him. He invested his fortune in that purchase, and took up his abode in that mansion—and he and his whole interest thus became, as it were, identified with that estate and rooted in the soil. The question here, however, is whether in September of the preceding year he had acquired a Scotch domicile.

To that question an affirmative answer was given by all the five learned Judges who considered the case in the Court below. A negative answer has been given by all my noble and learned friends who have now addressed the House. In these circumstances, and it being very much of a jury question, I may be excused for regarding it as a question of some difficulty.

The argument of the Respondents that Mr. *Bell*, having quitted *Jamaica* for good, and gone to *Scotland*, where he had many attractions, with the avowed intention of investing his fortune in land in *Scotland*, and having indicated no disposition to make any other investment, his Scotch domicile must be held to have commenced from the time he arrived in *Scotland* and set about the prosecution and realization of that object, although in the meantime, while prosecuting his inquiries, he provided himself with a temporary habitation, was very forcibly put, and under certain supposable circumstances might be entitled to the greatest weight. I do not think that the acquisition of a permanent habitation by purchase or lease is necessary to domicile, neither do I attach importance to the circumstance that his inquiries or views were not always directed to the same estate, or to estates in the same county. If it was clear that

prior to September, 1838, there was a fixed determination to invest his fortune in land in *Scotland*, and to reside there, I think that there was enough of actual residence to support the case of the Respondents. But I think that while he had a strong desire to invest in land in *Scotland* with a suitable mansion on it, the fulfilment of that desire was contingent on his finding an estate that would give him not only a suitable residence, but also an adequate return for his money. This was indispensable, because his whole fortune was to be invested. Such an investment is not always, or easily, to be got, and it is to me by no means clear that if he had not been able within a short time to obtain such an investment he would have remained in *Scotland*. Looking to what appears to have been the state of his health, and the opinions expressed as to the climate, it seems not at all unlikely that in that event he would have lived chiefly in a warmer climate, and perhaps occasionally visited his friends in *Scotland*. He might, or might not, have invested in land elsewhere. But I do not see sufficient ground for holding that he had resolved to make *Scotland* the country of his residence, except in the event of his being able to make such an investment as he desired. In the meantime his mind was unsettled as to where he should finally cast anchor. His location in *Scotland* was tentative.

If his final offer for *Enterkine*, in the spring of 1839, had been rejected, I see no reason to conclude that he would have remained in *Scotland*; and if he had then gone to a preferable climate and taken up his residence there, I think it could not have been held that he had in the previous September become a domiciled Scotchman. If he had gone to *Scotland* with intent to reside permanently there, without regard to any particular mode of investing his fortune, the contingency on which, I think, so much depends, would have been out of the case, and his location in *Scotland* would not have been attributable to that purpose of investigation previous to decision to which I think it may fairly be attributed. No doubt, the continuance of the residence of a person in any country, however long he has been there, may, in a sense, be said to be contingent on possible future occurrences. But that has no resemblance to the present case, for here the purpose to settle

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in a particular country, and so acquiring a domicile there, was contingent, and, as I think, in suspense.

Upon these grounds I am disposed to concur in the judgment proposed.

Other defences were pleaded in the action and were maintained in the Court below, and as the learned Judges in that Court were of opinion that the Scotch domicile had been established, it was proper, and, indeed, quite necessary, for them to deal with those other defences, and it would equally have been our duty to have done so if we had taken the same view as they did of the import of the evidence in regard to domicile; but in consequence of our having taken a different view of the import of that evidence it has now become unnecessary to deal with those other defences.

*Interlocutors reversed.*

Solicitors for the Appellants: *Grahames & Wardlaw.*
Solicitors for the Respondent: *Uptons, Johnson, & Upton.*

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*May* 29.

MRS. WILSON . . . . . APPELLANT;
MERRY & CUNNINGHAM . . . . . RESPONDENTS.

*Injury by a Fellow-workman, or Collaborateur—Difference of Grade—Master's Immunity—Principle of the Doctrine.*

L.R. 10 Q.B. 63, 4-5
10 Q.B. 128
1 C.P.D. 163
18 D. 252, 3, 6
256
9 Q.B.D. 360, 2, 6

*Per* THE LORD CHANCELLOR:—I do not think the liability, or non-liability, of the master to his workmen can depend upon the question whether the author of the accident is not, or is, in any technical sense, the fellow-workman, or *collaborateur*, of the sufferer.

*Per* LORD COLONSAY:—"Fellow-workman" and "*collaborateur*" are not expressions well suited to indicate the relation on which the liability or non-liability of a master depends, especially with reference to the great systems of organization that now exist. And these expressions, if taken in a strict or limited sense, are calculated to mislead. The same may be said of such words as "foreman," or "manager." We must look to the functions the party discharges, and his position in the organism of the force employed, and of which he forms a constituent part. Nor is it of any consequence that the position he occupies in such organism implies some special authority, or duty, or charge.

*Per* LORD CRANWORTH:—Workmen do not cease to be fellow-workmen because they are not all equal in point of station or authority.

*Per* LORD CHELMSFORD:—It has certainly been held by Scotch Judges of great eminence that the exoneration of a master from liability for injury

arising to one fellow-servant from the negligence of another does not take place where the servant occasioning the injury is placed in superintendence, control, or authority over the others. But the subsequent English cases have clearly established that there is no such distinction.

*Duties of the Master.*

*Per* THE LORD CHANCELLOR:—The master has not contracted or undertaken to execute in person the work connected with his business. The result of an obligation on the master personally to execute the work connected with his business, in place of being beneficial, might be disastrous to his servants, for the master might be incompetent personally to perform the work. At all events, a servant may choose for himself between serving a master who does, and a master who does not, attend in person to his business. But what the master is, in my opinion, bound to his servant to do, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work. When he has done this he has, in my opinion, done all that he is bound to do. And if the persons so selected are guilty of negligence this is not the negligence of the master; and if an accident occurs to a workman to-day in consequence of the negligence of another workman, skilful and competent, who was formerly, but is no longer in the employment of the master, the master is, in my opinion, not liable, although the two workmen cannot technically be described as fellow-workmen.

*Per* LORD COLONSAY:—Culpable negligence in supervision, if the master takes the supervision on himself;—or, where he devolves it on others, the heedless selection of unskilful or incompetent persons for the duty,—or the failure to provide or supply the means of providing proper machinery or materials;—may furnish grounds of liability; and there may be other duties, varying according to the nature of the employment, wherein, if the master fails, he may be responsible.

23 & 24 Vict. c. 151 (1860), "An Act for the Regulation and Inspection of Mines." Commentary by Lord *Chelmsford*.

AFTER a trial which lasted four days in January, 1867, Mrs. *Wilson* recovered a verdict against Messrs. *Merry & Cunningham* for the loss of her son, who was killed when engaged as a miner in their employment;—the jury assessing the damages at £100.

The counsel of Messrs. *Merry & Cunningham* took exceptions to the Judge's charge. One of these was allowed by the Court of Session, whose judgment of allowance, setting aside the verdict, and granting a new trial, formed the subject of Mrs. *Wilson's* appeal to the House.

The question, in a word, was whether her son's death had not been caused by the fault or negligence of a fellow-workman, so as to free Messrs. *Merry & Cunningham* from responsibility.

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Mr. *Quain*, Q.C., Mr. *Strachan*, and Mr. *Junner*, appeared for the Appellant.

Sir *Roundell Palmer*, Q.C., Mr. *Young*, and Mr. *A. B. Shand*, for the Respondent.

In the following opinions the facts and the arguments are fully stated.

THE LORD CHANCELLOR (1):—

My Lords, the Respondents in this case are coal and iron masters, owning the *Haughhead* coal-pit, near *Hamilton*, in the county of *Lanark*. This pit had, prior to the 21st of November, 1863, been sunk to the depth of ninety-five fathoms and contained four seams of coal. The upper seam, called the *Ell* coal, had been worked out, and the Respondents determined to work the next underlying seam, called the *Pyotshaw* coal. In order to open this seam from the side of the pit a scaffold was erected in the pit, from and by means of which to drive the level in the *Pyotshaw* seam. This scaffold was completed on Saturday, the 21st of November, 1863. On the following Monday, the 23rd of November, 1863, *Robert Wilson* and *Henry Wilson*, sons of the Appellant, were engaged by the Respondents to assist in driving this level; and on the 24th of November they went to work. The system of ventilation in the pit, before the scaffold was placed there, was of the usual kind, by downcast and upcast, and it is not suggested that before the platform was erected the system of ventilation was defective in any particular. The platform, however, interrupted the free current or circulation of air in the pit; and although it is stated that apertures were left in the platform on the upcast side for the return of the air from the shaft below, yet an accumulation of fire-damp appears to have taken place underneath the platform; and on the 25th of November, 1863, while *Henry Wilson* was searching on the scaffold with a light for a wedge which was missing, the light came in contact with the fire-damp coming from beneath the scaffold, and an explosion took place, by which the scaffold was blown up and *Henry Wilson* killed on the spot.

(1) Lord *Cairns*.

The present action was raised by the Appellant, as the mother of *Henry Wilson*, for damages in consequence of his death, and an issue was appointed by the Lord Ordinary for the trial of the cause in the following terms: "Whether, on or about the 25th day of November, 1863, the deceased *Henry Wilson*, miner, *Haughhead*, the son of the Pursuer, while engaged in the employment of the Defenders as a miner in said pit, was killed by an explosion of fire-damp through the fault of the Defenders, to the loss, injury, and damage of the Pursuer?"

It was not suggested that the Respondents themselves took any part in the erection of the platform, nor was any personal fault or negligence of any kind imputed to them. The general manager of their works in *Lanarkshire* was Mr. *Jack*. The manager of the *Haughhead* coal pit underneath *Jack* was *John Neish;* and subordinate to *Neish* was a man named *Bryce*, who attended to the underground operations. One *Neil Robson*, formerly a mining engineer, was a partner with the Respondents, and it was under the general direction of the Respondents and of *Robson* and *Jack* that the working of the *Pyotshaw* seam was commenced. The charge of sinking the pit, and making arrangements underground for working it, was given to *Neish*. It was proved at the trial, and, indeed, not controverted, that *Jack* and *Neish* were competent persons for the work on which they were engaged; selected by the Respondents with due care; and furnished by the Respondents with all necessary materials and resources for working in the best manner.

The cause was tried on the 2nd of January, 1867, and the three following days, before Lord *Ormidale*, and a verdict found for the Appellant, assessing damages at £100. Two exceptions were taken to Lord *Ormidale's* directions to the jury; the second of which was allowed by the Court of Session, and a new trial granted. It is on this exception alone that your Lordships are now called to express an opinion, the Appellant having appealed against the interlocutor of the Court of Session allowing the exception, which runs thus:—

Lord *Ormidale* charged the jury;—and, after explaining that in law the Defenders were not answerable for the consequences of an accident which could not have been foreseen, and by reasonable care and caution prevented, or for the conse-

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quences of an accident caused by deceased's own fault, or the fault of a fellow-workman, as *Bryce* must be held to have been in the present instance, engaged with him in the same common employment; and after also explaining the nature of the obligation under which employers lay of providing all apparatus and machinery necessary and proper for the safety of their workmen, proceeded to bring under their consideration the circumstances relating to the ventilation arrangement or system of the pit in question, distinguishing betwixt the keeping clear and in good working order the ventilation arrangement or system when completed, and after the deceased came to be engaged in the pit, and defect or fault in said arrangement or system itself. And in reference to the latter, Lord *Ormidale*, in the course of his charge directed the jury, that "if they were satisfied on the evidence that the arrangement or system of ventilation in the *Haughhead* pit at the time of the accident in question had been designed and completed by *Neish* before the deceased *Henry Wilson* was engaged to work in the pit, and that the Defenders had delegated to *Neish* their whole power, authority, and duty in regard to that matter, and also in regard generally to all the underground operations, without control or interference on their part, the deceased *Henry Wilson* and *Neish* did not stand in the relation of fellow-workmen engaged in the same common employment, and the Defenders were not on that ground relieved from liability to the Pursuer for the consequences of fault, if any there was, on the part of *Neish* in designing and completing said arrangement or system of ventilation."

The law applicable to cases of this kind has of late years come frequently under consideration, both in this House and in various Courts of law in *England* and *Scotland*. The cases up to the year 1858 are all reviewed in the case of the *Bartonshill Coal Company* v. *Reid*, decided by your Lordships (1). In that case my noble and learned friend, Lord *Cranworth*, explained with great clearness the difference between the liability of a master to one of the general public and his liability to a servant of his own for an injury occasioned not by the personal neglect of the master himself, but by the negligence of some person employed by him.

As to the liability of the master to the general public, my noble and learned friend expressed himself thus:—

Where an injury is occasioned to any one by the negligence of another, if the person injured seeks to charge with its consequences any person other than him who actually caused the damage, it lies on the person injured to shew that the circumstances were such as to make some other person responsible. In general, it is sufficient for this purpose to shew that the person whose neglect caused the injury was at the time when it was occasioned acting not on his own account, but in the course of his employment as a servant in the business of a master, and that the damage resulted from the servant so employed not having conducted his master's business with due care. In such a case the maxim "*respondeat superior*"

(1) 3 Macq. 282. 4 Jur. N.S. 767.

prevails, and the master is responsible. Thus, if a servant driving his master's carriage along the highway carelessly runs over a bystander, or if a gamekeeper employed to kill game carelessly fires at a hare so as to shoot a person passing on the ground, or if a workman employed by a builder in building a house negligently throws a stone or brick from a scaffold, and so hurts a passer-by; in all these cases (and instances might be multiplied indefinitely) the person injured has a right to treat the wrongful or careless act as the act of the master. *Qui facit per alium facit per se.* If the master himself had driven his carriage improperly, or fired carelessly, or negligently thrown the stone or brick, he would have been directly responsible, and the law does not permit him to escape liability because the act complained of was not done with his own hand. He is considered as bound to guarantee third persons against all hurt arising from the carelessness of himself, or of those acting under his orders, in the course of his business. Third persons cannot, or, at all events, may not, know whether the particular injury complained of was the act of the master or the act of his servant. A person sustaining injury in any of the modes I have suggested has a right to say: "I was no party to your carriage being driven along the road, to your shooting near the public highway, or to your being engaged in building a house. If you choose to do, or cause to be done, any of these acts, it is to you, and not to your servants, I must look for redress, if mischief happens to me as their consequence." A large portion of the ordinary acts of life are attended with some risk to third persons, and no one has a right to involve others in risks without their consent. This consideration is alone sufficient to justify the wisdom of the rule which makes the person by whom, or by whose orders, these risks are incurred responsible to third persons for any ill consequences resulting from want of due skill or caution.

But as to the liability of the master to his workmen, my noble and learned friend thus expressed himself:—

> But do the same principles apply to the case of a workman injured by the want of care of a fellow-workman engaged together in the same work? I think not. When the workman contracts to do work of any particular sort, he knows, or ought to know, to what risks he is exposing himself: he knows, if such be the nature of the risk, that want of care on the part of a fellow-workman may be injurious or fatal to him, and that against such want of care his employer cannot by possibility protect him. If such want of care should occur, and evil is the result, he cannot say that he does not know whether the master or the servant was to blame. He knows that the blame was wholly that of the servant. He cannot say the master need not have engaged in the work at all, for he was party to its being undertaken. Principle, therefore, seems to me opposed to the doctrine that the responsibility of a master for the ill consequences of his servant's carelessness is applicable to the demand made by a fellow-workman in respect of evil resulting from the carelessness of a fellow-workmen when engaged in a common work.

My Lords, I would only add to this statement of the law, that I do not think the liability, or non-liability, of the master to his workmen can depend upon the question whether the author of the

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accident is not, or is, in any technical sense, the fellow-workman, or *collaborateur*, of the sufferer. In the majority of cases in which accidents have occurred the negligence has, no doubt, been the negligence of a fellow-workman; but the case of the fellow-workman appears to me to be an example of the rule, and not the rule itself. The rule, as I think, must stand upon higher and broader grounds. As is said by a distinguished jurist: "*Exempla non restringunt regulam, sed loquuntur de casibus crebrioribus* (*Donellus de Jure Civ.* L. 9, c. 2, *n*). The master is not, and cannot be, liable to his servant unless there be negligence on the part of the master in that in which he, the master, has contracted or undertaken with his servant to do. The master has not contracted or undertaken to execute in person the work connected with his business. The result of an obligation on the master personally to execute the work connected with his business, in place of being beneficial, might be disastrous to his servants, for the master might be incompetent personally to perform the work. At all events, a servant may choose for himself between serving a master who does, and a master who does not, attend in person to his business. But what the master is, in my opinion, bound to his servant to do, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work. When he has done this he has, in my opinion, done all that he is bound to do. And if the persons so selected are guilty of negligence this is not the negligence of the master; and if an accident occurs to a workman to-day in consequence of the negligence of another workman, skilful and competent, who was formerly, but is no longer in the employment of the master, the master is, in my opinion, not liable, although the two workmen cannot technically be described as fellow-workmen. As was said in the case of *Tarrant* v. *Webb* (1), negligence cannot exist if the master does his best to employ competent persons; he cannot warrant the competency of his servants.

Applying these observations to the direction of the learned Judge to the jury in this case, I think the first error in that direction is, that it is pregnant with the suggestion to the jury that

(1) 25 L. J. (N.S.) C. P. 263.

if they found the scaffold to have been finished by *Neish* before the deceased was engaged to work in the pit, a liability for the accident was thrown upon the Respondents, which would not have existed if the deceased had been engaged before the scaffold was finished. This, my Lords, was calculated, as I think, to mislead, and appears to have misled the jury.

But, my Lords, I think there is another objection to the charge of the learned Judge. He asks the jury to consider whether the Respondents had delegated to *Neish* their whole power, authority, and duty in regard to the arrangement or system of ventilation, and also in regard generally to all the underground operations, without control or interference on their part.

My Lords, I think there is nothing in the evidence which would warrant a question being left to the jury in these terms. The Respondents had delegated no power, authority, or duty to *Neish*, except in the sense in which a master who employs a skilled workman to superintend a portion of his business delegates power, authority, and duty to the workman for that purpose. It was admitted that the Respondents gave no specific directions to *Neish* as to the manner or form in which the scaffold was to be arranged. They told him that the *Pyotshaw* seam was to be opened, and they left to him the arrangements underground for opening and working it. And the learned Judge ought not, as I think, to have suggested to the jury that this could be viewed in any other light than as the ordinary employment by the Respondents of a sub-manager or foreman. I think the learned Judge ought to have told the jury that if they were of opinion that the Respondents exercised due care in selecting proper and competent persons for the work and furnished them with suitable means and resources to accomplish the work, the Respondents were not liable to the Appellant for the consequences of the accident.

An argument was addressed to your Lordships founded on the 23 & 24 Vict. c. 151, under which the Appellant contends that the Respondents were absolutely bound by statute to have an adequate amount of ventilation in the pit, and that they were liable as for a breach of this statutory duty. It is sufficient, my Lords, to say that no such question is raised on this exception, nor was the

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learned Judge asked to give any direction to the jury on this score. Your Lordships will probably not express any opinion as to whether in some other stage of this action such an argument may, or may not, be maintained; and I only notice it at present in order to shew that it has not been overlooked.

On the whole, I must advise your Lordships to dismiss this appeal with costs.

LORD CRANWORTH:—

My Lords, the direction of the learned Judge complained of has been so fully stated by my noble and learned friend that I need not repeat it at length. The substance of it was, that if the system of ventilation had been completed by *Neish* before *Wilson* was engaged to work in the pit, and if the owners had delegated to him all their power and authority as to the underground operations, then he and *Wilson* were not fellow-workmen. This was clearly wrong. Workmen do not cease to be fellow-workmen because they are not all equal in point of station or authority. A gang of labourers employed in making an excavation and their captain, whose directions the labourers are bound to follow, are all fellow labourers under a common master, as has been more than once decided in *England*, and on this subject there is no difference between the laws of *England* and *Scotland*. Nor does it make any difference that the scaffolding, the imperfection of which is assumed to have caused the accident, had been all set up by *Neish* before *Wilson* began to be employed. In order effectually to carry on the work it was necessary that a scaffolding should be fixed under the superintendence of an underground manager, and when so fixed it was necessary that workmen should be employed at it in excavating the mine under similar superintendence. That *Neish* was a person competent to perform the duties of such underground manager was not a matter in dispute. He caused the scaffold to be prepared and fixed, and when that had been done *Wilson* began to work under him as manager. They thus clearly became fellow-workmen, and the circumstance that a part of the duties of *Neish* had been completed before *Wilson* began to work cannot be material. If, indeed, the owners had failed to take reasonable care in causing the scaffold to be erected the case would have been dif-

ferent, but of this there is no evidence. It certainly was not incumbent on them personally to fix the scaffold. They discharged their duty when they procured the services of a competent underground manager; and whether *Wilson* began to work with, or under, *Neish* before or after he had prepared the scaffold was a matter of no importance. From the time when he began to work he was a fellow-workman with him. The direction given by the learned Judge at the trial was certainly wrong, and the interlocutor granting a new trial was therefore right.

It is not necessary that we should say what direction the learned Judge ought to have given, but I have no difficulty in saying that he ought to have charged the jury to the effect that *Neish* and the deceased were, according to the evidence, fellow-workmen, and that the Defenders were not liable if they, the jury, were of opinion that *Neish* was a properly skilled workman to act as underground manager, even if there were defects in the scaffolding which caused the accident.

I have purposely abstained from any reference to the statute 23 & 24 Vict. c. 151, as the applicability of that statute to the facts of the present case does not arise on the present exception. I have considered the direction which ought to have been given as if no such statute existed.

LORD CHELMSFORD:—

My Lords, the only question which your Lordships are called upon to determine in the present appeal is, whether the second of the exceptions made to the direction of the learned Judge at the trial of the cause is good or not?

The consideration of the direction which the counsel for the Defenders asked from the Judge is not absolutely necessary, because the Court of Session did not deal with the exception to the Judge's refusal to give this direction; but the case cannot, in my opinion, be satisfactorily disposed of without some reference to the mode in which the questions ought to have been submitted to the jury.

The direction to which the second exception applies made the whole case turn upon the question, whether *Neish* and the deceased were fellow-workmen engaged in the same common employment,

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which the Judge told the jury they could not be, "if they were satisfied on the evidence that the arrangement or system of ventilation in the *Haughhead* pit at the time of the accident had been designed and completed by *Neish* before the deceased was engaged to work in the pit, and that the Defenders had delegated to *Neish* their whole power, authority, and duty in regard to that matter, and also in regard generally to all the underground operations, without control or interference on their part."

That the ventilation was faulty at the time of the accident there can be no doubt, nor that *Neish* had the superintendence and direction of all the operations in the pit, and therefore for the Judge to make the completion of the system of ventilation before the deceased was engaged to work in the mine, and the uncontrolled power and authority of *Neish*, the tests to determine whether he and the deceased were fellow-workmen, upon which the Pursuer's right to recover was made to depend, amounted to a direction to the jury to find a verdict for him.

Although the learned Judge, in the course of his summing up, distinguished "between keeping clear and in good working order the ventilation arrangement or system when completed, and a defect or fault in the arrangement or system itself," yet he does not appear to have left it to the jury to decide whether the accident occurred through faulty ventilation, or through casual obstruction in the ventilation, the latter of which appears from the evidence to be more likely to have been the case. But, supposing it to have been quite clear that the ventilation itself was defective, yet, if it occurred in the course of the operations in the pit, it ought to have been distinguished from that "system of ventilation and putting the mine into a safe and proper condition for working," which, according to the opinion of the Lord Justice *Clerk*, in *Dixon* v. *Ranken* (1), "it was the duty of the master for whose benefit the work is being carried on to provide." In the course of working the *Haughhead* pit it became necessary to arrange a system of what, for distinction's sake, I may call local ventilation. This must be considered as part of the mining operations, and therefore, even if the accident happened in consequence of the scaffold in the *Pyotshaw* seam having, under *Neish's* orders, been constructed so as to

(1) 14 Dunlop, 420.

obstruct the necessary ventilation, it would have been the result of negligence in the course of working the mine; and if *Neish* and the deceased were fellow-workmen, it would have been one of the the risks incident to the employment in which the deceased was engaged.

Lord *Ormidale* directed the jury that *Neish* and the deceased could not be fellow-workmen if the system of ventilation in the pit had been completed by *Neish* before the deceased was engaged to work in the mine. There is a little want of accuracy here in the learned Judge's language. If the negligence imputed to *Neish* is to be taken to have occurred at the time of the completion of the system of ventilation, the deceased could not have then stood in the relation of fellow-workman, for he was not a workman at all. I suppose the learned Judge meant to tell the jury that if the negligence which occasioned the accident was finished and completed before the deceased entered the service, the question of fellow-workmen did not arise. But, assuming this to have been the direction, it was open to exception. If the platform in the *Pyotshaw* seam was originally of improper construction for the purpose of ventilation, there was undoubedly a complete act of negligence on the part of *Neish* at the moment of its erection. But as he was bound to take care that sufficient ventilation was maintained during the whole time of the workings, as long as he omitted to do so he was guilty of negligence, which continued down to the time of the occurrence of the accident. It was therefore incorrect on the part of the learned Judge to confine the act of negligence to the one period of the completion of the system of ventilation, and thereby to conclude the question as to *Neish* and the deceased being fellow-workmen when the accident happened.

But the learned Judge put another question to the jury (whether in combination with the previous one, or independently of it, does not clearly appear), which, if found by the jury, would, in his opinion, have prevented *Neish* and the deceased from being fellow-workmen. That question was, whether the Defenders had delegated to *Neish* their whole power, authority, and duty in regard to the arrangement or system of ventilation, and also generally in regard to all the under-ground operations, without control or interference on their part. The words "delegated," and "without interference

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or control," are ambiguous, or, at all events, misleading expressions. Every master may be said to delegate to his servant the power, authority, and duty of his particular department in the service, without his interference and control, and yet he would be responsible to third persons for the consequences arising from the negligence of that servant in the performance of the duties so intrusted to him. What the learned Judge meant to tell the jury was, that if *Neish* "had the complete power of engaging and dismissing workmen as he pleased, and the ventilation process was entirely left to him without the direction or control of the Defenders, he was a superintendent, and not a fellow-workman with the deceased."

But if the learned Judge had so directed the jury, it would, in my opinion, have been a misdirection. It has certainly been held by Scotch Judges of great eminence that the exoneration of a master from liability for injury arising to one fellow-servant from the negligence of another does not take place where the servant occasioning the injury is placed in superintendence, control, or authority over the others. In the case of *M'Auley* v. *Brownlie* (1), Lord *Deas* said: "I think that the foreman was the master's representative, delegated to act for him in his absence, with power to give all the orders which he could have given; and that when the master so delegates his powers and duties in matters affecting life and limb, he must be responsible for the acts and omissions of representatives equally with his own." And in *Somerville* v. *Gray & Co.* (2), the Lord President said: "I think there is room for a distinction among different classes of servants acting under the same master, and I do not think that the House of Lords, or the Courts of *England*, have ever held expressly that there is not. The difficulty is where to draw the line of distinction."

But subsequent cases in *England* have clearly established that there is no distinction as to the exemption of a common employer from liability to answer for an injury to one of his workmen from the negligence of another in the same employment, in consequence of their being workmen of different classes. It is only necessary to refer for this point to *Wigmore* v. *Jay* (3), *Gallagher* v. *Piper* (4),

(1) 22 Dunlop, 975.
(2) 1 M'Pherson, 708.
(3) 5 Ex. 354.
(4) 16 C. B. (N.S.) 669.

and especially to *Feltham* v. *England* (1), where the Court said: "We think that the foreman was not, in the sense contended for, the representative of the master. The master still retained the control of the establishment, and there was nothing to shew that the foreman or manager was other than a fellow-servant of the Plaintiff, although he was a servant having greater authority." As was said by Mr. Justice *Willes*, in *Gallagher* v. *Piper* (2), "a foreman is a servant as much as the other servants whose work he superintends." And he added: "We think this case ranges itself with a great number of cases, by which it must be considered as conclusively settled that one fellow-servant cannot recover for injuries sustained in their common employment by the negligence of a fellow-servant, unless such fellow-servant is shewn to be either an unfit or improper person for the purpose."

The learned counsel for the Appellants, upon the argument at your Lordships' bar, laid an entirely new ground in support of the verdict founded upon the provisions of the Act of Parliament of the 23 & 24 Vict. c. 151, for the regulation and inspection of mines. Although the point was not made at the trial, and is not involved in the exception to which the interlocutor appealed from applies, yet as it is within the terms of the issue upon which a new trial may take place, it seems to me, notwithstanding the suggestion of my noble and learned friend on the woolsack, to deserve some notice.

By the 10th section of the statute in question, certain general rules are to be observed in every coal mine or colliery by the owner or agent thereof, and amongst them "an adequate amount of ventilation is to be constantly produced in all coal mines or collieries, to dilute and render harmless noxious gases to such an extent that the working places of the pits, levels, and workings, &c., shall, under ordinary circumstances, be in a fit state for working therein." And by the 22nd section, if any of the rules are neglected or wilfully violated by the owner or agent of the mine, such person shall be liable to a penalty of £20. It was argued that as the statute has imposed upon the owner the duty of providing proper ventilation, a failure in this respect (no matter to whom attributable) renders the owner responsible for the consequences.

(1) Law Rep. 2 Q. B. 33. (2) 16 C. B. (N.S.) 669.

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In support of this proposition the learned counsel cited the case of *Couch* v. *Steel* (1), which was an action by a seaman against a shipowner for neglecting to keep a proper supply of medicines on board the vessel, whereby the Plaintiff's health suffered. Upon demurrer it was held that although the statute 7 & 8 Vict. c. 112, s. 18, makes it the duty of the shipowner to have medicines on board, and imposes a penalty for a breach of that duty, recoverable by a common informer, a seaman sustaining a private injury for the breach of that statutable duty was entitled to maintain an action to recover damages. In this case there was no question as to the liability of the shipowner, the decision being merely that a person suffering damage from an omission of a duty was not deprived of his remedy because the Legislature had attached a penalty to such omission.

But the case of *Grey and Wife* v. *Pullen and Hubble* (2), which was also cited upon the point, has a more direct application. By the 110th section of the *Metropolis Local Management Act* (18 & 19 Vict. c. 120), whenever it is necessary for any person to break up or open the pavement, &c., of any street, he is with all convenient speed to complete the work and make good the pavement, and in the meantime to fence and guard the place, and light it during the night; and by sect. 111, if he fail in any of these respects he is to forfeit £5, and a further sum of 40*s.* for every day during which the offence continues. The Defendant *Pullen* employed the other Defendant *Hubble* as a contractor to make a drain from his premises across a public footpath. The female Plaintiff, passing along the footpath at night, fell into a hole or trench over the drain, and sustained injury. Mr. Justice *Blackburn*, who tried the cause, held that there was no evidence to go to the jury that *Hubble* had acted as the servant of *Pullen*, but as a contractor for the work, and that *Pullen* was not within the scope of the above-mentioned sections of the *Metropolis Local Management Act*, so as to be responsible for the performance of the work. A verdict was found against *Hubble*, with £65 damages; the Judge directing a verdict to be entered for the Defendant *Pullen*, reserving leave to move to enter the verdict against him also. Upon this motion being made, the Court of Queen's Bench unani-

(1) 3 E. & B. 402. 18 Jur. 515. (2) 5 B. & S. 970.

mously refused the rule, holding that the statute did not take the case out of the common doctrine, that if a person in the exercise of a right employs a contractor to do work, and the contractor is guilty of negligence in doing it, from which damage results, he, and not the employer, is liable. The Court of Exchequer Chamber, however, overruled the Court of Queen's Bench, and held that *Pullen* was liable to the Plaintiff for the injury, upon the ground that "a duty was implied in the grant of a power to open the drain in the highway in sect. 79 of the Act, and was expressed in sect. 110, and that the statutable duty was created absolutely, and not by sect. 111, imposing a penalty, to be enforced solely by enforcing the penalty. And that the penalty imposed by section 111 was a cumulative remedy."

I must confess that this reasoning is not at all satisfactory to my mind. The statutable duty is, no doubt, created absolutely for the purposes of the Act; but it is a duty which, if unperformed, can only be enforced by the penalty; and this for the protection of the public is to be recovered against the owner or occupier who causes the work to be done. If an individual sustains an injury in consequence of the work being imperfectly or improperly performed, a civil liability is not imposed upon the owner, if without the statutable obligation he would not have been liable. The remedy is, in one, sense cumulative, because the imposition of the penalty by statute does not take away the civil remedy; but the two proceedings have totally different objects—the one to punish an offence, the other to redress an injury. For the sake of the public it may be right to make a person liable for acts which another has done on his account; but it would be a violation of principle to make him civilly responsible for such acts where he is in no legal sense a principal or master of the person doing them.

I think, therefore, that the statute of the 23 & 24 Vict. c. 151, cannot have the effect of giving to the Pursuer a right of action which she would not have had without it, and that the defence of the deceased being a fellow-workman with *Neish* is open to the Defenders notwithstanding the statute.

The interlocutor appealed from ought, in my opinion, to be affirmed.

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LORD COLONSAY:—

My Lords, I am of opinion that the Respondents had good ground for exception to the charge of the learned Judge who tried the case; and that the exception taken by them was rightly sustained by the Court. The charge must be read with reference to the case in which it was delivered. The part of it excepted to was not a mere abstract proposition in law. It contained, as the charge in such a case generally ought to contain, an explanation to the jury of what, in the estimation of the Judge, were the cardinal points in the case to which their attention ought to be mainly directed, and his view of the law applicable thereto. But in doing so the points should be stated without the admixture of elements either not properly within the case disclosed, or so little within it that they ought not to be considered—and without ignoring elements properly within the case, and to which the minds of the jury ought to be directed. Ambiguous or equivocal expressions, whereby the jury may unconsciously be misled, ought, of course, to be avoided as far as possible.

The cause of death was an explosion of fire-damp, which blew up a scaffold or platform whereon the deceased was working at the time. That occurrence is said to have been occasioned by faulty construction of the scaffold, inasmuch as sufficient provision was not made for the passage of air upwards. The scaffold had been erected in the shaft a few days previously for a temporary purpose. It was no part of the general arrangement or system of ventilation of the pit; but it was calculated to obstruct temporarily, to a certain extent, the free action of that system of ventilation, which is not alleged to have been previously imperfect. The purpose of the scaffold was to enable workmen to stand upon it till by lateral works in the *Pyotshaw* seam they could obtain a lodgment in that seam. The person who ordered the erection of the scaffold for that purpose was *John Neish*, the manager of the Defenders at that pit. The persons who actually constructed the scaffold were *James Bryce*, the under-ground manager, and *James Wilson*, a miner. They finished the operation on Saturday. On Monday the deceased and his brother were engaged to work at the *Pyotshaw* seam, and were taken down the pit, and shewn where they were to work. On Tuesday morning the deceased began working. On

Wednesday morning he resumed working, and his brother *Robert* joined him. On that day, after breakfast, the explosion took place.

The case for the Pursuer was this: She maintained that it was the duty of the Defenders to have a proper system of ventilation in their pit; that they devolved that duty and the whole charge of the pit on their manager, *Neish;* that *Neish* was in fault in not seeing that the ventilation was effectually provided for; and that the Defenders, having delegated their own powers and duties to *Neish*, are responsible for his fault.

The position of *Neish* in the establishment was made a point of importance. He appears to have been the manager of the pit in question. He had under him *Bryce*, who is described as the under-ground manager or foreman; and he had over him another servant of the company, *Jack*, who is described as the general manager, taking a general superintendence and management of that mine and other mines belonging to the Defenders. *Jack* gave from time to time general instructions to *Neish* in regard to the pit in question, leaving to *Neish* to carry out the details of the working, and to employ workmen for that purpose, and dismiss them at pleasure.

Assuming that the injury was attributable to imperfection in the construction of the scaffold, and that such imperfection was owing to fault or negligence on the part of *Neish*, the question came to be, whether the Defenders were responsible for his fault.

Cases of this class have of late years been frequent, and the law applicable to them has been much discussed in both ends of the island, and has been considerably matured by those discussions. The constantly-increasing scale on which mining and manufacturing establishments are conducted, by reason of new combinations and applications of capital and industry, has necessarily called into existence extended organizations for management—more gradations of servants, more separation or distribution of duties, more delegation of authority, and less of personal presence or interference of the master. The same personal superintendence and supervision by owners or masters, common and beneficial in some minor establishments, is in many cases unattainable, and, even if attainable, would not be beneficial. The principles of the

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1 Ex D. 254

law, however, have sufficient elasticity to enable them to be applied, notwithstanding such progressive changes in the manner of conducting business.

I hold it to be quite clear that the liability of a master for injury done by the fault or negligence of his servant falls to be dealt with on different principles where the sufferer is a stranger, and where the sufferer is a fellow-servant engaged in the same common employment. The distinction was fully recognised by Lord *Cranworth*, and effect was given to it by this House, in the case of the *Bartonshill Company*. Whether the present case does or does not belong to the latter class, it certainly does not belong to the former class. The deceased was not a stranger; he was, at the time he received the injury, a workman in the employment of the Defenders, in their coal mine. *Neish* was also in their employment there. If it is not alleged that there was any personal fault or neglect on the part of the master, on what principle does liability attach to him? Does such liability flow from the nature of the contract of service under which the deceased was working? I think that there are duties incumbent on masters with reference to the safety of labourers in mines and factories, on the fulfilment of which the labourers are entitled to rely, and for the failure in which the master may be responsible. A total neglect to provide any system of ventilation for the mine may be of that character. Culpable negligence in supervision, if the master takes the supervision on himself;—or, where he devolves it on others, the heedless selection of unskilful or incompetent persons for the duty,—or the failure to provide or supply the means of providing proper machinery or materials;—may furnish grounds of liability; and there may be other duties, varying according to the nature of the employment, wherein, if the master fails, he may be responsible. But, on the other hand, there are risks incident to occupations more or less hazardous, and of which the labourer who engages in any such occupation takes his chance. It is eminently so in regard to mining operations. There are perils of the pit as well as of the other deep, and one of those perils is the risk of the consequences that may, even in the best regulated pits, result from the carelessness or recklessness, or other fault, of one or more of those persons composing the organized body engaged in working the

mine. The master does not impliedly insure the workman against such perils.

Is the fault attributed to *Neish* one of this last character? I think it must be so regarded, unless there was something in the relation of *Neish* to the Defenders, or to the deceased, which deprives it of that character. It is not alleged that the general system of ventilation of the pit, as it had existed anterior to the erection of the scaffold, was not good, or that *Neish* was not a fit man to be placed in the position he occupied. In neither of these respects was there any fault or negligence on the part of the Defenders; nor is it alleged that in any other respect there was personal fault on their part. But it is said that *Neish* was not a fellow-workman of the deceased—that he was in some sense and to some effect a representative of the Defenders, holding delegated powers from them, and that they are therefore liable.

Now I agree with what has been said as to the terms "fellow-workman" and "*collaborateur*." They are not expressions well suited to indicate the relation on which the liability or non-liability of a master depends, especially with reference to the great systems of organization that now exist. And these expressions, if taken in a strict or limited sense, are calculated to mislead. The same may be said of such words as "foreman," or "manager." We must look to the functions the party discharges, and his position in the organism of the force employed, and of which he forms a constituent part. Nor is it of any consequence that the position he occupies in such organism implies some special authority, or duty, or charge, for that is of the essence of such organizations, as, for instance, in this case, *Bryce* is admitted to have been within the principle of a fellow-workman, although he was foreman and underground manager, and had the immediate charge of constructing the scaffold, and was primarily to blame for its defects, if any; *Neish* was one step higher, and may have been in fault for not detecting *Bryce's* error; but yet *Neish* was subordinate to a still higher servant, *Jack*. They were all links in the same chain. If the master was responsible for injury done to *Wilson* through the fault of *Neish*, on the ground that, strictly speaking, they were not fellow-labourers, he would, on the same ground, have been liable to *Neish* for injury done to him through the fault of *Wilson*.

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Now the direction of the learned Judge with reference to the circumstances of this case appears to me to have been objectionable for these reasons:—First: It deals, apparently, with the alleged defect in the scaffold as if it was a defect in the general arrangement or system of ventilation of the pit, for which in certain views the Defenders might be regarded as liable, whereas it was a defect in the construction of a temporary structure erected by order of *Neish* for certain working operations, whereby the free action of a good system of ventilation was temporarily interfered with, which raised a totally different question for the consideration of the jury in reference to the liability of the Defenders for the fault of *Neish*. But the distinction does not appear to have been adverted to. Secondly: It suggests to the jury that if the faulty scaffold was completed before *Wilson* entered into the employ of the Defenders, a liability was imposed on the Defenders which would not otherwise have existed, inasmuch as in that case *Wilson* and *Neish* could in no view have been fellow-workmen at the time when the fault was committed by *Neish*. But if it was the duty of *Neish* to provide for the passage of air upwards in the shaft, that duty did not cease with the erection of the scaffold, but continued while the scaffold remained, and he was in fault so long as that duty was not performed. It was not merely the erection of the scaffold on Saturday, but the maintenance of it in a defective state until Tuesday morning, that caused the injury, if it was really caused by the defective construction of the scaffold; and consequently there was no room for the suggested disconnection of *Wilson* and *Neish* as fellow-workmen. Thirdly: The direction points the attention of the jury to the question, whether *Wilson* and *Neish* stood in the relation of fellow-workmen engaged in the same common employment, as the test of non-liability, without sufficient explanation of what constituted that relation; and, in particular, without explaining that diversity of duties and gradation of authority are not inconsistent with that relation, and without referring to the effect which might be produced on the liability of the master by a careful selection of proper persons to take charge of different departments in the working of the mine.

On the whole, I am disposed to adopt the words of one of the learned Judges in the Court below, who has said that the case had

been "imperfectly and inadequately stated by the Judge, and so stated as tending to mislead the jury." At the same time I am not surprised that the learned Judge who tried the case should have been embarrassed by the rather unsatisfactory and somewhat conflicting state of the authorities and decisions on a branch of law which has only lately approached maturity.

A point was made on the statute of the 23 & 24 Vict. c. 151, I am not disposed to pronounce any opinion in reference to the effect of that statute. There may possibly be questions of considerable nicety arising upon it. It is a public statute passed for the avowed purpose of giving greater safety to workmen in mines; it imposed duties upon the owners of mines, and a question may perhaps be raised as to whether workmen engaging in the service of a mine-owner may not be entitled to rely upon the due performance of such duties as being implied in the contract of service. That is a point upon which I do not wish to express any opinion, because the exception we are now dealing with is apart altogether from any such question.

*Interlocutor affirmed, and appeal dismissed with costs.*

Solicitors for the Appellant: *Shaen & Roscoe.*
Solicitor for the Respondents: *James Dodds.*

1868 June 8.

GREIG . . . . . APPELLANT;
THE UNIVERSITY OF EDINBURGH . . RESPONDENTS.

*Rateability for Relief of the Poor where the Property, though Public, is unconnected with the Crown.*

49 B. 24,
7 H. L. 477-8-9,
10 Q. B. 286
2 Jur. (N.S.) 576
7 Q. B. D. 128

The property of the *Edinburgh* University is neither held by the Crown nor for the Crown. It is therefore rateable to the relief of the poor.

*Per* LORD CRANWORTH:—The ownership of this property is not in the Crown—neither is the occupancy. The University are not only the sole owners but the sole occupiers.

*Per* THE LORD CHANCELLOR:—That the property of the *Edinburgh* University is dedicated to public purposes, must now be taken to be a wholly insufficient ground of exemption.

*Rateable Value of the Property.*

*Per* LORD CRANWORTH:—With regard to the question of *value*, the receipt of the matriculation fees and of the class fees is sufficient.

*How to be calculated.*

The 8 & 9 Vict. c. 83, s. 37, directs that "the value shall be taken to be the rent which may be reasonably expected, one year with another." In making this estimate it is not clear that the tenant is to be regarded as precluded from using the property otherwise than as the University uses it.

THE Respondents sought from the Court of Session a judicial declaration that they were not liable to be rated for the relief of the poor, either as owners or as occupants of the premises and property held by them for the purposes of the *Edinburgh* University.

In support of their contention they averred that "the buildings of the *Edinburgh* University, being national or public property—or dedicated to national or public purposes—and from the occupation of which no revenue was derived—were not subject to assessment for poor-rates."

The Respondents, on the other hand, insisted that—inasmuch as the premises in question constituted "lands and heritages" within the meaning of the *Poor Law Act*—they were subject to be assessed for the relief of the poor.

The Lord Ordinary (1) gave judgment in favour of the Appellants,

(1) Lord *Barcaple*.

holding it to be clear, on the authorities, that the buildings of the *Edinburgh* University *were* liable to this assessment. But on a reclaiming note the Second Division, by recalling the Lord Ordinary's decision, gave rise to the present appeal.

Sir *Roundell Palmer*, Q.C., Mr. *James Thom Anderson*, and Mr. *Junner*, were of Counsel for the Appellant.

The *Lord Advocate* (1), and Mr. *Mellish*, Q.C., for the Respondents.

The House, agreeing with the Lord Ordinary, reversed the judgment of the Second Division without calling on the Appellant's Counsel for a reply to the argument of the Respondents.

The following opinions were delivered by the Law Peers.

THE LORD CHANCELLOR (2):—

My Lords, in this case an action of declarator was raised by the University of *Edinburgh* against the Parochial Board of the parish of *Edinburgh*, through their public officer, to have it declared that the University are not liable as owners or occupiers of the University buildings to any assessment for the poor-rate. The record was closed, but no proof was led; and upon the averments on the record and consideration of the pleas in law, the Lord Ordinary (3) assoilzied the Defender from the conclusions of the summons. The Second Division of the Court of Session recalled that interlocutor, and declared in terms of the conclusions of the libel. From that decision of the Second Division this appeal comes before your Lordships.

Two questions, which are very different, have been argued at your Lordships' bar. One of the arguments has been that the buildings of the University of *Edinburgh* were exempt from rateability on the score of what I may term Crown privilege, irrespectively of any question as to value. The second ground of argument was that they were exempt, or rather that they ought not to be rated, on the score of being of no annual value. These two questions must be kept distinct.

(1) Mr. *Gordon* (2) Lord *Cairns*. (3) Lord *Barcaple*.

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Now, as to the first of these questions, namely, the claim for exemption on the score of Crown privilege, the manner in which the case is put by the pleas in law for the Respondents is this: they say that the buildings of the University, being national or public property, or property dedicated to national or public purposes, are not subject to assessment. The Lord Justice *Clerk*, in his opinion on the subject, states that the University of *Edinburgh* is, in its corporate capacity, a servant of the Crown, owning and occupying the University buildings under the control and supervision of the Crown and government of the country for important national objects (1).

The general principle which regulates the decision of questions of this kind has been well settled in your Lordships' House. I refer to the cases of *The Mersey Docks* (2) and *Adamson* v. *The Clyde Trustees* (3), and *The Commissioners of Leith Harbour* (4). The general principle, as I understand it, approved of by your Lordships in these cases is this, that the Crown, not being named in the English or Scotch statutes on the subject of assessment, and not being bound by statute when not expressly named, any property which is in the occupation of the Crown, or of persons using it exclusively in and for the service of the Crown, is not rateable to the relief of the poor.

If that is the true principle (and such it must now be taken to be), I think your Lordships will find that it is very easy of application to the present case. The University of *Edinburgh* is, no doubt, a great public and national institution; but the corporation of the University of *Edinburgh* is a corporation independent of the Crown—no doubt originally created by, but still independent of the Crown. Its property is not Crown property, but it is property vested in the *Senatus Academicus* for the University purposes. I agree with the statement of the Lord Ordinary (5), who said that the property could not be considered in any sense Crown property, nor would the assessment of the property directly or indirectly affect the Crown.

With regard to the allegation in the pleas in law, that it is pro-

(1) Scottish Jurist, vol. xxxvii. p. 601.
(2) 11 H. L. C. 443.
(3) 4 Macq. 91.
(4) Law Rep. 1 H. L., Sc. 7.
(5) Scottish Jurist, vol. xxxvii. p. 599.

perty dedicated to public purposes, that dedication, after the decicions of this House in the cases to which I have referred, must now be taken to be a wholly insufficient ground of exemption. Therefore, on the first argument of exemption on the score of Crown privilege, it appears to me that the buildings of the University of *Edinburgh* cannot be brought, in any sense, under that exemption.

Then, my Lords, on the second point, the question of value, it has been put, on behalf of the Respondents, that the property is not capable of producing value. But I must remind your Lordships that we are not here to decide on any question of *quantum* of value in respect of which the property should be assessed—that may be a matter of some difficulty, which may have to be considered in detail hereafter. The question which your Lordships have now to deal with is whether the argument now adduced, which was not much relied on in the Court below, that the premises are not capable of producing value, is an argument which ought to prevail.

It might be sufficient to say that where we find the University of *Edinburgh* actually in occupation, and conducting all the great purposes for which they are incorporated, in and by means of these buildings; that alone is a beneficial occupation which, subject to the question of what the *quantum* of benefit may be, is clearly an occupation rateable for the relief of the poor. And it further appears clear, partly by the record and partly by admissions at your Lordships' bar, that the University are in the habit of receiving matriculation fees from the students who attend these buildings, which fees would clearly not be paid unless these were buildings of which the students could have the benefit for the purpose of receiving instruction. It, moreover, appears on the record, and by those admissions, that the professors are allowed to receive fees from the students who attend their classes; and it is, of course, obvious that if the professors were not allowed to receive those fees they would themselves have to be remunerated by higher salaries paid to them by the University. And therefore, indirectly again, in that shape, the University obtains the benefit of the fees which are paid to the professors; which fees, again, would not be paid by the students unless there were proper class-rooms in which

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the professors could deliver their instructions to the students. But I am bound to say that even beyond that, the Act of Parliament which deals with this question suggests (I will not say more, nor is it necessary that your Lordships should now say more) a test of value which, as it appears to me, might well be made applicable to cases of this kind, because the 8 & 9 Vict. c. 83, after providing in the 34th section: "that one-half of such assessment shall be imposed upon the owners, and the other half upon the tenants or occupants of all lands and heritages within the parish;" the 37th section enacts: "That in estimating the annual value of lands and heritages, the same shall be taken to be the rent at which one year with another such lands and heritages might in their actual state be reasonably expected to let from year to year," under certain deductions therein mentioned.

It was argued at the Bar that it must be taken that a tenant who became the lessee of these lands would not be able to use them otherwise than as the University could use them; that is to say, would not be able to put them to any other uses than the University would do. It may not be necessary to determine that question now; but it appears by no means clear that any such ingredient is to be taken into account when you are endeavouring to ascertain what a tenant would give for the premises in their present state. That point may better be determined when the question is specifically raised. But on the grounds I have mentioned, I think your Lordships will be of opinion that there is in these premises clearly an annual value, and if that be so, they are not exempt from rateability on the ground that they are like the case put in argument in one of the cases that came before your Lordships—the case of a barren rock, which is utterly without any value.

Speaking, therefore, my Lords, with great respect for the decision of the Court of Session, I am bound to advise your Lordships, and I move your Lordships, that the decision of the Lord Ordinary was right, that the interlocutors of the Second Division of the Court of Session ought to be reversed, and that, in substance, the Defender should be assoilzied from the conclusions of the libel, with expenses both of the proceedings before the Lord Ordinary, and also of the reclaiming note to the Court of Session.

LORD CRANWORTH:—

My Lords, I entirely concur; and have very little to add to what has fallen from my noble and learned friend. I think the Court of Session has fallen into a great error in its application of the *Mersey Dock Case* (1). I find that the Lord Justice *Clerk* says, as the foundation of his opinion, that this comes within the exception of Crown property, that "throughout the whole history of the University, and very specially in recent Acts of Parliament, the Crown is recognised both as the fountain from which the whole rights of the University flows, and also as the visitorial authority to the control of which it is at all times subject" (2). That may be perfectly true; but that does not make the property Crown property. As has been suggested in the course of the argument at the Bar, so far from what is alleged shewing the property to be in the Crown, it distinctly shews it to be out of the Crown, for it was part of the argument that by Royal Charter it was granted to the University. So that clearly the ownership is entirely out of the Crown. But if the ownership is out of the Crown, then *à multo fortiori* the occupancy is out of the Crown. That the occupancy is in the University is clear from this:—The professors are allowed, and it is their duty to use, certain rooms for their classes, but they can only occupy them for such purposes and in such mode as the University shall permit. They could not (as was suggested) give dinners or balls there—certainly not—as they might do in any other rooms of which they had the sole occupation. Therefore it seems to me perfectly clear that the University are not only the sole owners but the occupiers of the property—and as to the supposition that they are occupying it as servants of the Crown, and that the Crown is performing certain duties there, as in the case of Courts of Justice, it is absurd; because the Crown does not grant degrees, or deliver lectures, nor do those who perform these acts in any respect perform them as servants of the Crown. Therefore the Crown is quite out of the question. With regard to the question of *value*, I think the receipt of the matriculation fee is quite sufficient. And the fact that the professors, by occupying rooms belonging to the University and under the control of the University receive fees from their classes, is, I think, also conclusive.

(1) 11 H. L. C. 443. (2) Scottish Jurist, vol. xxxvii. p. 601.

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But I desire to be understood as concurring with my noble and learned friend when I say that I very much doubt whether any of these matters are at all to be taken into consideration. When the statute says that the value is to be calculated according to what a solvent tenant would pay for the property, making certain deductions which are specified, I am not at all satisfied that it means that the tenant is only to occupy it for the same purposes for which it is occupied by the body that is proposed to be rated.

LORD WESTBURY:—

On the question of exemption, anterior to the decisions of your Lordships' House in the *Mersey Dock Case*, great looseness of expression prevailed in the language of the decisions. We had a variety of decisions in which it was held that property held for charitable purposes, being held for public purposes, was not to be regarded as liable to poor-rates. The true ground of exemption was ascertained and expressed by this House in the *Mersey Dock Case*; and it was found to rest altogether upon this fact, that the poor laws did not include the Crown, the Crown not being named in the statute. The result therefore was that Crown property, and property occupied by the servants of the Crown, and (according to the theory of the constitution) property occupied for the purposes of the administration of the government of the country, became exempt from liability to poor-rate. The confusion and looseness involved in the words "national objects" were thereby removed.

Now, nobody will contend that the functions of a University—to teach, to instruct, to confer degrees, are functions involved in the administration of the government of the country. They are perfectly distinct; and it is impossible therefore to bring the functions of a University within the proper meaning of government purposes; and, if so, it is impossible to hold that property granted by the Crown to the University, or for the purposes of a University, is property granted for the service of the government of the country. This ground of exemption, therefore, not being at all applicable to the University, the conclusions of this declarator must, on that ground alone, be repelled and the Defender assoilzied from the action.

But there may be another ground of non-liability, namely,

where the property has no rateable value. Now, I do not mean by anything that I say on this occasion to prejudice at all the proper consideration of that question. For it may possibly be held that if property is occupied by persons for a purpose yielding no value at all, and they are absolutely prohibited from using it in any manner that would be productive of value, it may, I say, possibly be held that there is no rateable value in that property; and that, in that sense, therefore, it ought not to be assessed to the poor-rate. But the University of *Edinburgh* is the occupant of the property in a character and for a purpose that entitles it to receive, and in respect of which it does actually receive, a certain amount of pecuniary value which must be regarded as incidental to its occupation.

LORD COLONSAY:—

My Lords, I concur in the judgment which has been suggested, and upon the grounds stated. I also concur in the reservation which has been made by my noble and learned friend who last spoke. Possibly a question may be raised as to the rateable value of this property. The summons of declarator that is before us concludes for absolute non-liability. Now to that I cannot give an assent. Therefore it is necessary that from that there should be an absolvitor. But other questions may be raised; other questions have been raised of a more limited kind. I do not think they are properly before us here, nor have we all the materials for disposing of them. And, therefore, while I would be for assoilzieing the Defender from the conclusions of this action, I would not be for precluding the Pursuers in the action from raising any question as to the measure of liability which attaches to them, when that question comes fairly to be raised. The cases that were decided anterior to the *Mersey Dock Case* and other recent cases, and the practice that prevailed anterior to those decisions, did, I think, give great countenance to the judgment pronounced in the Court below; and had it not been for these recent cases I do not know that I should not have concurred in that judgment, taking those former cases to be correct exponents of the law. But the principles laid down in the *Mersey Dock Case*, and some other cases almost concomitant with it, are, I think, sufficient to shew

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that the buildings of the University of *Edinburgh* are not buildings of the kind which entitle the owners and occupants of them to exemption from liability for poor rate.

*Interlocutors appealed from reversed; and Defender assoilzied from conclusion of summons, with expenses before the Lord Ordinary and the Court of Session.*

Solicitors for the Appellant: *Murdock, Rodger, & Gloag.*
Solicitors for the Respondents: *Loch & Maclaurin.*

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1868
*June* 15.

CARRICK . . . . . APPELLANT;
MILLER . . . . . RESPONDENT.

*Lease under the Montgomery Act—Statutory Nullity.*

The *Montgomery Act* (1), in order to encourage the formation of villages and the erection of houses on entailed estates in *Scotland*, authorized the owners of such estates to grant leases for ninety-nine years, of not more than five acres to each individual, such leases to be void if one dwelling-house of the value of £10 should not be built for each half-acre within ten years from the dates of such leases:—

*Held* by the House (affirming the judgment of the Lord Ordinary and of the Inner House), that where a lessee under the *Montgomery Act* had failed to erect within the prescribed period the dwelling-houses required by the Act, the case was not one of mere irritancy, which might be cured, but of statutory nullity, annihilating the lease.

A lease under the *Montgomery Act* was granted for the erection of a powder magazine.

Whether this lease, on the policy of the statute, was void *ab initio*, the Law Peers did not determine; but they were clear in their opinion that inasmuch as the lessee, the erector of the powder magazine, had failed, within the proper period, to build the required dwelling-houses, his lease had become absolutely void, and his offer to build, *after* the proper period, gave him, under the circumstances, no claim to equitable relief or consideration.

A letter from the lessor to the lessee, dispensing with the condition as to building the required dwelling-houses:—*Held* to impose no obligation on the subsequent heir of entail.

THE Respondent's father, in January, 1851, being then the heir of entail in possession of the estate of *Frankfield*, in *Lanarkshire*,

(1) 10 Geo. 3, c. 51, "An Act to encourage the Improvement of Lands held under strict Entail in *Scotland*."

granted a lease for ninety-nine years under the *Montgomery Act* to the Appellant, in order that he might erect "a gunpowder magazine" on the premises;—stipulating also, in conformity with the statute, that if the dwelling-houses required by it were not completed within ten years the lease should be void. On the same occasion the Respondent's father gave the Appellant a letter saying, "I hereby, in so far as I can legally do so, dispense with your building the dwelling-houses."

The gunpowder magazine was erected by the Appellant forthwith, but no "dwelling-houses" were built;—so that the Respondent, on succeeding his father, brought this action to have the lease reduced and set aside (1).

The Lord Ordinary decided that under the *Montgomery Act* the lease was "null and void;" while the Second Division, on a reclaiming note, held that, by reason of the Appellant's failure to build the dwelling-houses within the time required by the statute, "the lease was ineffectual, and not binding on the Respondent." Hence the present appeal.

The *Dean of Faculty* (2) and Mr. *Cotton*, Q.C., were heard for the Appellant.

Sir *Roundell Palmer*, Q.C., and Mr. *J. M. Duncan*, for the Respondent.

At the close of the argument the following opinions were delivered:—

LORD CRANWORTH:—

My Lords, the question in this case arises upon a lease under what is called the *Montgomery Act*, which was passed in 1770, reciting and enacting as follows:—

Whereas the building of villages and houses upon entailed estates may in many cases be beneficial to the public, and might often be undertaken and executed if heirs of entail were empowered to encourage the same by granting long leases of lands for the purpose of building, be it therefore enacted that it shall be in the power of every proprietor of an entailed estate to grant leases of land for the pur-

(1) 3rd Series, vol. v. p. 715; Scottish Jurist, vol. xxxix. p. 368.
(2) Mr. *Moncreiff*.

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pose of building for any number of years not exceeding ninety-nine years, but that not more than five acres shall be granted to any one person, and that every such lease shall contain a condition that the lease shall be void, and the same is thereby declared void, if one dwelling-house at least, not under the value of £10 sterling, shall not be built within ten years from the date of the lease for each one half-acre of ground comprehended in the same.

Now, my Lords, the gentleman who granted the lease in the present case, Mr. *Miller*, was tenant in tail of an estate under a deed of entail which contained the following clause:—

That it shall not be lawful to any of the heirs of tailzie and heirs whatsoever who shall succeed to the said lands and estate, to set tacks or rentals thereof for any longer space than twenty-five years.

Therefore, when Mr. *Miller* came into possession of the estate he might under the entail have granted a lease for twenty-five years only, but he availed himself of the *Montgomery Act* to grant a lease for ninety-nine years.

The lease was granted for the purpose of erecting a powder magazine. The powder magazine was erected; but the conditions of the *Montgomery Act* were not performed. For it was a condition of the *Montgomery Act* that not less than one house of a certain small value, for every half-acre, should be erected within the term of ten years; and that if such houses were not erected the lease should be absolutely void. Now, that this lease was granted under the *Montgomery Act* is plain, because it purports to be so granted; and it is obvious that except for the length of term allowed by the *Montgomery Act* no person would have taken a lease to erect an expensive building like a powder magazine upon the land. Then the condition not having been performed, there can be no doubt the lease under the *Montgomery Act* becomes absolutely void.

A question was raised whether it was not void on the ground that the *Montgomery Act* never contemplated such a thing as a lease for erecting a powder magazine, that the object of the Act was to induce the erection of other buildings in the neighbourhood, and that the building of a powder magazine, so far from contributing to that end, would put a stop to it, for nobody in his senses would take a house in the neighbourhood of a powder magazine if he could get one anywhere else. I think there is considerable force in that objection, looking at the context of the Act of Parliament.

The Lord Ordinary, taking that view, declared the lease upon that ground void *ab initio*. The Inner House did not think that the *Montgomery Act* prohibited such a building as a powder magazine; or rather, I should say, they did not take the view that it did not authorize such a building; but I shall proceed upon the validity of what has been done by the Inner House on other grounds.

That the lease became void in consequence of the requisite buildings not being erected in the course of ten years is plain. It was, however, argued very strongly on the part of the Appellant that there is here merely what is called in the Scotch law a legal irritancy, and that that irritancy may be purged, and that the Court in the exercise of its equitable jurisdiction can grant, and ought to grant, to the present Appellant leave to put himself right, as it were, by now building that which he ought to have built within ten years of the grant of his lease. I am clearly of opinion, that even if it were competent, it would be a most unwise exercise of equitable jurisdiction to take such a step in the present case, because, whether or not a lease of a piece of ground for the purpose of building a powder magazine is, or is not, absolutely void under the provisions of the *Montgomery Act*, it appears to me that to give any facility or help to a person who has put up such a nuisance in a neighbourhood, would be a most unwise exercise of discretion.

It was urged by the Appellant that the lease was good for the term of twenty-five years. But it appears to me quite chimerical to attempt to treat those twenty-five years allowed by the entail as a part of the ninety-nine years which were granted by this lease under the statute.

On these grounds I think the Court below has come to a correct conclusion in this case, and that the only result must be that this appeal should be dismissed, and the interlocutors appealed against affirmed with costs.

LORD COLONSAY:—

Mr. *Miller* held this estate under an entail which prohibited the granting of leases for more than twenty-five years. The lease in question is for ninety-nine years. It is professedly granted in the terms and by virtue of the Act of 10 Geo. 3. No such lease could have been granted by Mr. *Miller* except for the purposes, and sub-

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ject to the provisions and conditions, of that statute; and accordingly the lease in question professes to have been granted for those objects and subject to those conditions.

The ten years have elapsed, the houses have not been built, and Mr. *Miller*, the grantor of the lease, having died, the present heir of entail, says, that under the express terms of the statute, and also under the express terms of the lease itself, it is now void; for the lease contains a clause declaring the lease to be void if the houses are not built within ten years.

He further maintains that it was incompetent to grant a lease at all for the purpose of erecting a powder magazine, that not being within the scope of the statute. The tenant, on the other hand, maintains that he is now at liberty to do what he has hitherto failed to do, on the principle of purging the irritancy; and he further contends that he is at least entitled to sustain his possession until the lapse of twenty-five years from the date of the lease, because Mr. *Miller*, under his powers as proprietor, irrespectively of the statute, had authority to grant a lease which would endure for that period.

I do not desire to express any opinion as to whether it was competent to authorize the erecting of a powder magazine under a lease granted in conformity with the statute of 10 Geo. 3, under and for the purposes of that statute; but I am of opinion that the lease professes to have been granted as a lease under that statute, under which alone a lease for ninety-nine years could be granted. I am further of opinion, that while there is in it an obligation to erect the buildings which the statute requires, the back-letter which was granted by Mr. *Miller*, dispensing with that condition so far as he was concerned, is not one which can affect the subsequent heirs of entail. In fact, if it were allowed to do so, it would be an attempt to compel the subsequent heir of entail to concur in the contravention of his entail.

I do not say that the lease is void *ab initio*, but, with reference to purging the irritancy, it is to be observed that the words of the statute are very peculiar. Not only do they declare that the non-fulfilment of this condition shall be a ground for setting aside the lease, but the statute itself declares that the lease shall be void at the expiry of the ten years if the houses have not been built. The

lease says the same. It is therefore a conventional irritancy. It is a condition of the lease—a contract between the parties—that if the buildings are not erected within the ten years the lease shall be void. The expression extends to the whole lease; it makes no distinction between one subject and another. It says, if these things be not done within ten years the lease shall be void.

It is said the Appellant ought to have time yet to do these things,—that, I think, is quite out of the question. If a landlord stipulates that a certain course of operations shall be carried on and shall be completed within ten years, otherwise the lease shall be null and void; and if at the end of the ten years the party has not even commenced the operations which he had undertaken to complete, it seems to me that it would be contrary to all equity as well as law to hold that he is now at liberty to begin to perform these things which he ought to have completed. It would be making a different contract between the parties.

Then, as to the lease continuing for twenty-five years, I think it is clear, on the face of this lease, that it is not a lease granted in reference to the powers of the proprietor under the conditions of the entail, but that it is granted plainly and avowedly as a lease authorized by the statute of 10 Geo. 3, and of no other character, and that, having come into the predicament in which that statute declares, and the lease itself declares, it shall be void, we have no other alternative than to declare that it is so. I therefore entirely concur in the judgment proposed by my noble and learned friend.

*Interlocutors affirmed, and appeal dismissed with costs.*

Solicitors for the Appellant: *Grahames & Wardlaw.*
Solicitors for the Respondent: *Connell & Hope.*

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June 25.

THE CARRON COMPANY AND MRS. LOTHIAN, WIDOW . . . . . } APPELLANTS;
HUNTER, *et al.* . . . . . RESPONDENTS.

*Residuary Legatees and Specific Legatee—Construction.*

12 C.D. 660

Contest as to ten shares in the *Carron Company*, between residuary legatees under a testamentary disposition and the executrix of a specific legatee under a codicil. Decision by the House that the shares went to the specific legatee, although, in consequence of a fraudulent concealment, the testatrix was ignorant of the real magnitude of the gift she was bestowing.

*Per* THE LORD CHANCELLOR:—The codicil passed the shares with every right that was incident to them.

*Per* LORD CRANWORTH:—The shares bequeathed by the codicil included everything appertaining to them.

*Per* LORD COLONSAY:—The real question is, whether the fund went to the specific legatee or to the residuary legatees. The testatrix died in ignorance of the facts. The words which she has used are not necessarily conclusive. But, upon the whole, I think that no violence is done to the will by the construction which is proposed to be put upon it:—

*Held* (reversing the decree below), that the residuary legatees had no title to demand satisfaction in respect of the fraudulent concealment aforesaid, or in respect of the compensation which the executrix of the specific legatee had received for it.

THE deceased Mrs. *Lothian* had ten shares in the *Carron Ironworks Company* bequeathed to her by her husband, Mr. *Caldwell*, who died on the 24th of October, 1824.

In April, 1828, she married Mr. *John Lothian*, settling the shares upon trust for herself to her separate use, and to her husband for life should he survive her—one-half of the fee, failing children, to belong to Mr. *Lothian*, the other to go as Mrs. *Lothian* should direct.

By testamentary disposition, dated the 3rd of November, 1837, she directed her trustees, after satisfying certain specified bequests, to invest the residue of her means and estate for the benefit of her sister, Mrs. *Philp*, in life-rent, and for the benefit of the children of Mrs. *Philp* in fee. Under this testamentary disposition Mr. *Hunter*, the above Respondent, was the sole surviving trustee.

On the 16th of June, 1843, Mrs. *Lothian*, by a codicil, made an

absolute gift of the *ten shares* to her husband (1). She died without issue on the 17th of January, 1847, survived by Mr. *Lothian*, who sold the shares to the company (under a clause of pre-emption) for £6800. Having done this, he again entered into wedlock by marrying Miss *Marion Macfie*, his now widow, the above Appellant, whom, by his last will and testament, he appointed his sole executrix, and to whom he bequeathed all his property, real and personal, of every denomination. He died on the 19th of December, 1851.

In 1861 the second Mrs. *Lothian* (Miss *Macfie*) brought an action against the *Carron Company* and against certain shareholders who had been concerned in its management, alleging that the ten shares had been sold by her deceased husband at a price greatly under their true value, and that the sale had been induced by fraudulent concealment and misrepresentation on the part of the individual Defenders (2). This action was compromised for £11,000, in consideration of which she confirmed the sale, and discharged and released the company from all her claims against them.

The action out of which the present appeal arose was commenced in 1863 by Mr. *Hunter* (the above Respondent) as trustee for the residuary legatees of the deceased Mrs. *Lothian*, against the *Carron Company*, against its individual managers, and against the *present* Mrs. *Lothian* (the recipient of the £11,000), praying an account and payment of £30,000, or such other sum as should be ascertained to be the balance due in respect of the fraudulent concealment aforesaid;—the question raised being, who was entitled to challenge the fraudulent concealment which had taken place with reference to the property of the company from 1824 to 1847, inasmuch as during that period the first Mrs. *Lothian*, had she known the facts, could have insisted on a distribution, from the benefits of which she had been fraudulently excluded.

In one of the pleas in law for the company, and for the present Mrs. *Lothian*, they averred that she, as executrix of her deceased husband, "having become vested with the whole rights which he

(1) See the Lord Chancellor's opinion, *infra*, p. 365.

(2) The concealment by the managers was alleged to extend to £700,000, the whole of which was afterwards made good to the company.

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had in connexion with the said shares, and having confirmed the sale of the same and discharged the company, the present action could not be maintained."

The Lord Ordinary, on the 15th of May, 1865, found that "the residuary legatees had set forth a sufficient title to insist in the action;" and to this interlocutor the First Division of the Court of Session adhered. Hence the present appeal to the House.

The *Dean of Faculty* (1), and Mr. *Cotton*, Q.C., having been heard for the Appellants, and Sir *Roundell Palmer*, Q.C., and Mr. *Horn*, for the Respondents, the following opinions were delivered by the Law Peers:—

THE LORD CHANCELLOR (2):—

My Lords, the question which lies at the threshold of this case is the right and title of the Respondents to maintain the action which was instituted by them in the Court of Session.

The facts which require to be stated are very few in number. The *Carron Company* was established in the year 1760, and it received a grant of a royal charter in 1773. At that time, and from that time and onward, it was regulated by a contract of co-partnery which was dated in the year 1771. It was of the nature of an incorporated joint stock company. The shares were transferable; but before any transfer or sale they had to be offered to the company, which might, on certain terms as to price, become the purchasers of the shares. Provisions were made as to the capital and stock of the company, and as to the mode of ascertaining and declaring the dividend, and other provisions such as are usual in similar institutions.

In the year 1828 Mrs. *Caldwell*, a widow, held ten shares in this company. She was about to be married to Mr. *Lothian*, and by her marriage contract these ten shares were settled in substance upon her for life, then upon her husband for life, and then upon the children of the marriage if there should be any. Failing children, one-half of the *corpus*, or fee, was to belong to the husband, and the other half was to go as Mrs. *Lothian* should direct by instruments of the kind described in the marriage contract.

(1) Mr. *Moncreiff*. (1) Lord *Cairns*..

In pursuance of this contract, and of the power contained in it, she made a testamentary disposition in the year 1837, by which, after giving various specific benefits to different persons named in it, which were to be satisfied out of her property, as to the residue of her property she expressed herself thus:—

> I direct and appoint my trustees to invest the whole residue of my means and estate remaining after satisfying each and all of the foregoing provisions and appointments, in heritable bonds, or such other securities as they may approve of, for behoof of my sister, Mrs. *Mary Hunter*, or *Philp*, spouse of *Charles Philp*, merchant, *Bonnington*, in life-rent, for her life-rent use alleuarly, exclusive of the *jus mariti* of her present or any future husband, and to *Charles*, *Mary*, and *Jane*, the children procreated of my said sister, equally amongst them in fee.

Under this residuary gift the Respondents claim.

To this testamentary disposition Mrs. *Lothian* added a codicil in the year 1843, upon the construction of which I think your Lordships will find that the question in the present case, in a great measure, turns. In that codicil she made this provision for the benefit of her husband, Mr. *Lothian*:—

> In the third place, as my said husband thinks highly of the stock of the *Carron Company*, whereof I hold ten shares, I do hereby direct and appoint my said trustees, or survivor, to allow my husband the option of taking, if he pleases, said ten shares as part of his provisions under said marriage contract, such ten shares to be estimated to him as not exceeding in value the sum of £6000 sterling, and my said trustees being at the whole expense of completing his title to the same; and in order that the title of the said trustees nominated in said marriage contract, survivors, or survivor, may be complete, I do hereby assign and convey said ten shares over to them in trust for the ends, uses, and purposes specified in said marriage contract and in these presents, declaring that in the event of the said *Carron Company* insisting on their right to have the first offer of these shares, any increased price which may be got by said trustees therefor beyond said sum of £6000 shall belong as a gift to my said husband, and that whether he takes said shares or not, and to carry out my intention said shares shall, if necessary, be offered to said company at the market price of the day, or at such price as my said husband shall consider them to be worth. And I do hereby declare that the provisions herein contained in favour of my said husband are in addition to and over and above those previously conceived by me in his favour, and that the same shall be considered preferable to all other provisions made or to be made by me in favour of other parties.

Mrs. *Lothian* died in the year 1847. The shares were proposed to be taken by her husband under the codicil, but the company electing to become the purchasers, they were sold to them for £6800, and a tripartite contract was executed between Mr. *Lothian*,

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in his own right,—the trustees of his wife,—and the company,—dated in the year 1847, by which the shares and all interest in them were conveyed, so far as the parties could convey them, to the company. The wording of this tripartite contract may, I think, be put aside. It does not advance the case in any respect beyond the position in which it would stand if the case had rested on the codicil alone.

The question now arises between the residuary legatees and the representative of Mr. *Lothian*, his widow and executrix.

It appears that in the progress of this company very large profits were made from time to time beyond those which were acknowledged and brought into the balance sheet and divided among the shareholders. Those profits are alleged, as to part, to have been concealed among the assets of the company, and not brought to light or laid before the shareholders; and as to the other part, to have been misappropriated, and fraudulently abstracted from the funds of the company. This is alleged to have been done by persons who were agents of the company, and done by them for their own objects. Beyond all doubt a very gross fraud was committed—a fraud, however, which was clearly a fraud of the agents upon the company, and not in any sense a fraud of the company as such. The funds to which I have referred have since been brought back, and may now be taken to be in the possession and under the control of the company. For the purpose of what I have to submit to your Lordships, I think it better to assume, as indeed was contended on behalf of the Respondents at your Lordships' bar, that these funds, either in whole or in part, if they had been known at the time at which they came into existence, ought to have been brought into the balance sheets of the company, and ought to have been, and beyond all doubt would have been, divided in the shape of dividends among the shareholders. In point of fact, whatever was the position formerly taken up by the company in this respect, the company itself now agrees to this view of the case. They agree further, that in consequence of these funds having been concealed they became the purchasers from Mr. *Lothian* of the ten shares in question at what was an under-value. They agree further, that they must make good the difference in value between what was

paid for the shares and what ought to have been paid for them. And they allege (and this, indeed, is not disputed) that this they have already done—that they have paid by way of compromise to the representative of Mr. *Lothian* the additional value which ought to have been placed on the shares.

On the other hand, the residuary legatees allege that they are the persons to whom this payment and satisfaction ought to have been made; they allege that these profits were obtained during the lifetime of Mrs. *Lothian*, while she was life-rentrix of the shares, and that her residuary legatees are now entitled to the dividends that would represent her share in those profits.

I assume that the declaration of the dividend and its payment was prevented by the fraud of the agents of the company—I assume, further, that in consequence of the dividend not having been declared, the company remained the possessor of those funds, or of a great portion of them—I assume, further, that the company must make good those funds to the persons who are entitled to them—but the question remains, to whom are they to be made good?

The answer to that question appears to me to depend upon another extremely simple and short question:—Did the right to compel a division of those newly-discovered funds pass as an incident to the shares, or did it remain with the previous owner of the shares? I think that, beyond all doubt, those funds which I have described as the newly-discovered funds remained part of the estate or credit of the company *de facto* at the time of the execution of the codicil. If there were debts due from the company, these funds must have gone and been applied to the payment of those debts, and the shareholders for the time being could, in my opinion, have taken nothing but the surplus assets of the company after paying all debts. Any right, therefore, of the deceased Mrs. *Lothian* was a right by virtue of, and attached to, the ten shares of which she was the owner, and if her codicil passed those ten shares, it appears to me beyond all doubt that it passed along with the shares every incident that properly attached to the shares. Now that the codicil passed the shares appears to me to be beyond all possibility of argument; it passed them in terms the most general that could be used, and it passed, in my opinion, along with them every right

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that was incident to the shares. In order to make the disposition more emphatic this declaration was added, that the provisions contained in the codicil in favour of the husband should be taken to be in addition to and over and above those previously conceived by her in his favour, and that they should be considered preferable to all other provisions made, or to be made, by her in favour of other parties—preferable, therefore (if it were necessary to resort to this clause), to the disposition made in favour of the residuary legatees.

Upon these short and simple grounds, if they meet with your Lordships' approval, I think that the course which your Lordships should adopt (speaking with great respect for the majority of the Court of Session) is, to hold that the Pursuers have not made out any title to insist on their claim in this action; and that from the time that the record was closed, the interlocutors pronounced by the Lord Ordinary and by the Court of Session cannot be sustained. I would therefore humbly advise your Lordships to reverse the interlocutors, commencing with that of the Lord Ordinary of the 15th of May, 1865 (the previous interlocutors were merely introductory), and to assoilzie the Defenders in the action, with expenses.

LORD CRANWORTH:—

I concur with my noble and learned friend in the conclusion at which he has arrived, and in the grounds upon which he has proceeded. Mrs. *Caldwell*, by her codicil, assigns the ten shares to her trustees in order that her husband might, if he thought fit, take them as part of his claim under the marriage contract, at the value of £6000; and she expressly declares that any sum which may be got for the shares beyond £6000 shall belong to her husband as a gift from her. If, therefore, her claim on the dividends withheld were included in the word "shares," that claim passed to her husband.

I cannot doubt that *the share* includes everything effeiring or appertaining to the share—everything which, if the affairs of the company were wound up, would belong to the shareholder at the time of the winding-up. If at the date of the tripartite contract in September, 1847, Mr. *Lothian*, instead of selling and transfer-

ring his shares to the company, had induced them to bring its affairs to a close, all its assets must have been realized, and its debts paid, and then the surplus would have been divisible into 600 parts, ten of which would have belonged to Mr. *Lothian* as the holder of ten of the 600 shares. This surplus must have included the whole of the profits which had up to that time been kept back from the knowledge of the shareholders. And it can make no difference that the affairs of the company were not brought to a close, but were continued to be carried on. That which would have belonged to the shareholder as his share of the assets of the company if its affairs had been wound up, continued to be his, though its affairs were not wound up. I am unable to imagine a case in which a person not a shareholder can set up a claim in competition with the shareholders to funds which are admitted to be funds of the company. I do not doubt that if Mrs. *Lothian* had in her lifetime taken proper steps, she might have compelled the company, or those who managed its concerns, to pay over to her the fair proportion of the accumulated profits appertaining to her ten shares. But that would have been a right which she would have possessed as being then a shareholder. So if, by her will, she had said, that she gave the ten shares to her husband, but with a provision that he was only to take the shares to the extent in value of £6000, and that any profits belonging to the shares beyond that sum should go as part of her residue, there is no doubt that by apt words this might have been done. But she has not done it. She has given the shares to her husband, and this gift must, I think, include all which the owner of the shares could claim.

I have attentively considered the opinions of the learned Judges below, but I own they do not convince me. I must also observe that they were not unanimous, and the Lord President (1) who was one of the majority, evidently felt great difficulty, and came to the conclusion in favour of the Respondents with much hesitation.

With these few observations, I have only to express my concurrence in the course recommended to your Lordships by my noble and learned friend.

(1) Now Lord *Colonsay*.

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LORD COLONSAY:—

I concur in what has been said by my noble and learned friend who last addressed your Lordships, as to the rights which would have belonged to Mrs. *Lothian* had she in her lifetime insisted on them. I think that upon statements such as we find upon this record she would have had a right to insist on the separation and distribution of the funds which had been so fraudulently withheld from distribution. I think that she would have been entitled to do that, as being the party entitled to the dividends. If these funds attached inseparably to the shares, *i.e.*, to the stock, by reason of not having been distributed when they ought to have been distributed, it would follow that she could not have compelled the company to distribute them. But these funds had lain in a state of suspense and concealment, and she might therefore, as I conceive, have insisted on the company doing that which they contend now they would not have been bound to do, namely, to state a new account, and to pay over to her, as the party who had been from year to year entitled to the dividends, that proportion of the funds so concealed which ought to have been paid to her. But the question is not quite the same when we are dealing with the matter after her death, she having made a settlement of her affairs; and I concur with both my noble and learned friends who have addressed your Lordships, in thinking that the real question to be determined here is, whether, by her settlement, the fund in question went to Mrs. *Lothian*, or went to her residuary legatees. Now, it is pretty clear that Mrs. *Lothian* herself had no opinion on this subject, because she made her will and died in ignorance of the facts. But still the question requires to be solved, and there may be principles found for solving it. In the stage of the case in which the question is now raised, I cannot adopt the plea maintained by the Defenders that, the averments of the Pursuers being substantially groundless and unfounded, the Defenders are entitled to absolvitor; because we have not gone into that inquiry. Neither can I adopt the plea that the sale of the shares which is sought to be reduced was a sale for a fair and adequate price, and that, therefore, the Pursuers are not entitled to succeed. If Mrs. *Lothian* had made a claim in her lifetime upon these profits, the Defenders might have set up these pleas; but they would not

have been sufficient to exclude her from inquiry. An investigation must have taken place; and if Mrs. *Lothian* had established the facts stated on this record I think she would have prevailed. But, on the other hand, I think that if she had discovered the fraud it would have been in her option to have insisted upon having the funds distributed, or if she thought it more for her advantage to do so she might have allowed the funds which had been concealed to be added to the stock, and so enhanced the value of the shares. Now, as she did not know of this fraud we cannot say how she would have exercised her option if she had known it. Therefore we are placed in a difficulty; *non constat* that she would have insisted upon the distribution of the funds, instead of taking the benefit of them in the increased value of the stock of the company. I think that the words which she has used in conveying the shares to her husband are not necessarily exclusive of his right, although I think there is room to doubt whether she meant that he should take the shares with all the benefits that could still be got from them, whether they were benefits that might have been reaped during her lifetime, or not. But, upon the whole, I think that no violence is done to her will by the construction which is proposed to be put upon it; and, although I entertain some doubts, I am not disposed to dissent from the result which has been come to by my two noble and learned friends.

*Interlocutors reversed.*

Solicitors for the Appellants: *Grahames & Wardlaw.*
Solicitors for the Respondents: *Loch & Maclaurin.*

1868 July 16.

THE HON. C. FLEEMING . . . . . APPELLANT;
HOWDEN . . . . . RESPONDENT.

*Devolution or Shifting Clause in an unrecorded Entail.*

4 Appeals 55

A shifting clause binds the heir, though the entail be not recorded, and it binds his creditors if they have had notice of it.

Such notice will be sufficient if the shifting clause is set out in the record of seisins.

*Consequent Trust cast on the Heir in Possession.*

The heir of entail in possession in such a case will be deemed a trustee for those entitled under the shifting clause; more especially where the clause requires the heir in possession instantly to denude, and he fails to do so.

An obligation to do an act with respect to property creates a trust; and if the party who is subject to the obligation acquires or retains, by means of his neglect of duty, a greater interest than he would otherwise have had,—he becomes a trustee of such excess for the benefit of those who would have been entitled to it if the obligation had been duly fulfilled.

*Per* LORD WESTBURY:—The doctrine of trusts has the same origin, and rests on the same principles in Scotch and in English law; and it should be developed to the same extent in both systems of jurisprudence.

*Bankruptcy of a Deceased Debtor.*

*Per* LORD WESTBURY:—Under the 19 & 20 Vict. c. 89, where a sequestration issues against a deceased debtor, nothing passes to the trustee for the creditors except such property as the debtor was beneficially entitled to at the time of his decease.

The trustee under a sequestration is in the same position as a gratuitous alienee. He takes subject to all the rights and equities that affected the property at the time of the bankruptcy.

*Sales of Superiorities under the* 20 *Geo.* 2, *c.* 50.

*Per* LORD WESTBURY:—There is an obligation and trust created by the 20 Geo. 2, c. 50, requiring that property bought with the proceeds of the sales of superiorities, shall be settled to the original uses; and this trust affects the heirs respectively succeeding to the purchased lands.

THE late *John*, fourteenth Baron *Elphinstone*, having died on the 13th of February 1861, in pecuniary embarrassment, a petition under the bankruptcy statutes was presented to the Lord Ordinary of the Court of Session, praying that the estate of *Duntiblae*, in which Lord *Elphinstone* had stood enfeft as tenant in tail at his death, should be transferred to and vested in the trustee under the bankruptcy.

The Lord Ordinary refused the application, holding that the *Duntiblae* estate had passed away from Lord *Elphinstone* under a shifting clause on his succession to the peerage in 1860, when his right to *Duntiblae* ceased, and when he became bound forthwith to denude in favour of the next heir, his sister, Viscountess *Hawarden*.

The *Duntiblae* entail, though followed by a recorded enfeftment, had not itself been entered on the register of entails. The Lord Ordinary, nevertheless, was of opinion that Lord *Elphinstone's* creditors had had sufficient notice of the shifting clause from the public record of seisins. His judgment, however, was recalled by the Second Division, who, on the 1st of February, 1867, ruled that inasmuch as the entail of *Duntiblae* had never been recorded, Lord *Elphinstone* should be regarded as absolute owner thereof, and not as tenant in tail subject to the shifting clause. They, therefore, ordered that the estate should be transferred to and vested in the trustee to meet the demands of the creditors. Hence the present appeal on behalf of Mr. *Fleeming*, the son of Lady *Hawarden*, who on her decease had become next heir under the *Duntiblae* entail.

Sir *Roundell Palmer*, Q.C., Mr. *Pattison*, and Mr. *Morgan Lloyd*, appeared for the Appellant.

Mr. *Pearson*, Q.C., and the *Dean of Faculty* (1), for the Respondent.

The following opinions were delivered by the Law Peers.

LORD CRANWORTH:—

My Lords, on the 24th of June, 1741, *John* Earl of *Wigton* settled very extensive real estates in *Scotland* in tail on a certain succession of heirs; and there was a clause in the deed providing that if any of the heirs should succeed to the dignity of the peerage, they should respectively be bound and obliged forthwith to denude themselves of the entailed estates, and the same should from thenceforth *ipso facto* accrue and devolve upon the next heir of tailzie. The deed was duly fenced with all proper irritant and resolutive clauses, and was duly recorded.

(1) Mr. *Moncreiff*.

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Soon after the rebellion of 1745 an Act of Parliament (1) was passed, the object of which was to put on a better footing the feudal relations of the great lords in *Scotland* with their vassals. It provided, among other things,—

> That it should be lawful for any person possessed of a tailzied estate in *Scotland*, comprehending lands or superiorities of vassals under a holding of him, to sell to such vassals, or any of them, the superiorities over their respective lands, at such prices as the parties should agree for; and thereupon to resign such lands for new infeftment to be granted to such buyer: Provided always, that the moneys paid as the price of such superiorities, being part of a tailzied estate, should be laid out and settled to the same uses, and with the same limitations and restrictions, as such superiorities were settled before the sale thereof.

Several sales were made by the *Wigton* family under the provisions of that Act, and the money produced was invested upon trust; when eventually, in the year 1847, it came into the hands of a gentleman named *Turnbull*, who laid out the amount, according to the provisions of the Act, in the purchase of lands which we will designate by the general name of *Duntiblae*. These were settled upon precisely the same destination as that of the original deed of entail of 1741. The deed of 1847, however, was not recorded.

At this time *John Fleeming* was in possession, not only of the original lands, but also of the lands of *Duntiblae*, and so continued until the 19th of July, 1860, when he succeeded to a peerage; and then the question arose as to the effect of what we in *England* call a shifting clause, but what, I believe, in *Scotland* is called a conditional destination, viz. the clause which in that event carried over the entailed lands to the next heir of tailzie.

*John Fleeming*, having become Lord *Elphinstone*, lived to enjoy the peerage but a very short time, for he died in the following month of January, leaving his sister, Lady *Hawarden*, to succeed him as the next heir of entail; and she was served as heir of tailzie and provision both to the originally settled lands and to the *Duntiblae* lands.

Lord *Elphinstone* died in very embarrassed circumstances, and on the 19th of June, 1862, a creditor presented a petition under the Scotch *Sequestration Act* to have his lands sequestrated.

The Lord Ordinary, in the Court below, was of opinion that the

(1) 20 Geo. 2, c. 50.

case did not come within the statute, and he refused to make any order. From that decision, however, the trustee under the sequestration presented a reclaiming note to the Inner House. A record was made up, and eventually the Inner House differed from the Lord Ordinary; their opinion being that the case *was* within the statute; and they directed the Lord Ordinary to make a declaration according to the terms of the statute, vesting the lands in the trustee. The Lord Ordinary complied, and reported his decision to the Inner House, who affirmed it. Against those interlocutors, directing the estate to be vested in the trustee, this appeal has been presented to your Lordships; and whether they are right is the question which we have now to determine.

When, in July, 1860, *John Fleeming* became a peer, the next heir of entail, his sister, Lady *Hawarden*, contended that from that moment she was entitled to the *Wigton* estates. The question was whether the effect of that shifting clause was *instanter* to transfer the property from Lord *Elphinstone* to his sister, Lady *Hawarden*. That question was very much discussed in the Court below; all the Judges were consulted; and they came to a clear opinion unanimously that, in point of fact, the moment *John Fleeming* became Lord *Elphinstone* he *ipso facto* became, as it were, trustee for the next heir of entail, and that the next heir of entail had nothing to do with proving an irritancy of the entail, but that *ipso facto* his title and interest as tenant in tail had ceased; and that he was bound immediately to denude in favour of his sister. As a consequence she was held entitled to the whole rents and profits which accrued in respect of the lands subsequently to the time when *John Fleeming* became a peer. In that case no question arose about the validity of the entail, because the proceeding related solely and exclusively to the originally settled estates of the Earl of *Wigton*, and as to those there was no question that the entail had been validly recorded.

The question now for decision is, whether the Appellant, *Cornwallis Fleeming*, being tenant in tail of *Duntiblae* according to the unrecorded deed of entail of the 4th of October, 1847, the Court had, or had not, power to order those lands to be transferred to, and vested in, the Respondent as trustee under the sequestration.

If *John Fleeming* had died without a peerage, the right of the

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trustee to call for a transfer would have been clear (subject to the argument of the Appellant, that it was unnecessary to record the entail of *Duntiblae*, an argument to which I will subsequently advert; for when Lady *Hawarden*, on the death of her brother, made up her title to those lands of *Duntiblae* as his heir of tailzie and provision, it would in such case have been clear that she had made up a title to what was his heritable estate at his death; and it would have been heritable estate which his creditors might attach.

The Inner House of the Court below, however, by a majority of three to one, came to the conclusion, that as the entail of *Duntiblae* was not recorded, the creditors of Lord *Elphinstone*, who had become such after his accession to the peerage, were entitled to regard him as fee simple proprietor, and so to rely on the fee of the lands as a fund of credit. The Inner House held that, though the clause of devolution imposed on Lord *Elphinstone* a personal obligation on acquiring the peerage, to denude of *Duntiblae* in favour of the next heir of tailzie, yet that, till this had been done, the rights of creditors were not affected. The three learned Judges all expressed their opinion that this was the true legal effect of what had been done; holding that the lands in question were liable to all the debts of Lord *Elphinstone*, as well those incurred after, as those incurred before he became a peer. They did not, however, think it necessary to decide this question as to debts incurred after the accession to the peerage, inasmuch as there were certainly debts incurred prior to that event, the existence of which would, they thought, warrant the trustee in the prayer of his Petition. The interlocutor now under appeal leaves this question open as to debts incurred after the accession to the peerage, for it merely directs the lands to be transferred and vested in the Respondent as trustee on the sequestered estate of Lord *Elphinstone*, leaving him to deal with it as the law may require.

Although, however, the interlocutor is properly silent as to what creditors will be entitled to resort to these lands for payment of their debts, yet, unless the Court was right in the opinion that the lands remained liable to all Lord *Elphinstone's* creditors who became such after his accession to the peerage, I do not see how the interlocutors can be supported. What the Court is called on

to do is to exercise a power given by statute; and unless the case is brought within the terms of the statute the power does not exist. The statute enacts that when sequestration is awarded against the estate of a person after his death, and his successor has made up a title to his heritable estate, the trustee may apply to the Lord Ordinary, praying that such estate shall be transferred to and vested in him; and power is given to the Lord Ordinary to make such order accordingly. This power is confined to the case where a successor has made up his title to the heritable estate of the deceased. If, therefore, in this case, *John Fleeming*, on succeeding to the peerage, had, according to the provisions of the entail, conveyed the *Duntiblae* lands to his sister, they would not at his death have been part of his heritable estate, and so would not have been within the provision of the 106th clause. It may be conceded (subject to the argument of the Appellant, that no recording of the entail of *Duntiblae* was necessary), that no creditors of Lord *Elphinstone* who were creditors before he had conveyed to his sister, would have had rights against them in the hands of Lady *Hawarden;* but the lands themselves certainly would not have formed part of *his* heritable estate at his death, and so could not have been transferred to the trustee under the sequestration by virtue of an order of the Lord Ordinary. Here, however, Lord *Elphinstone* did not convey the lands to his sister, but continued to hold them till his death; and she then caused herself to be served in special, as heir of tailzie and provision to her late brother, and made up her title accordingly. She thus brought these lands within the purview of the 106th section, if they were within the true intent and meaning of that section the heritable estate of Lord *Elphinstone* at his decease. It certainly was his heritable estate within the meaning of the 106th section, if the Lord Justice Clerk is right in his position that the legal character of his infeftment, as it stood before his accession to the peerage, did not by the happening of that event become, as between him and persons trusting him on the faith of his original title, a mere fiduciary fee. The two other learned Judges who concurred with the Lord Justice Clerk took substantially the same view with him. But Lord *Benholme*, who, as Lord Ordinary, had refused the application of the trustee, took a different view of the case, adhering to

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the opinion which he had formed as Lord Ordinary. His opinion was, that though Lord *Elphinstone* remained feudally vested in the lands of *Duntiblae* till his death, yet that from the time of his accession to the peerage he was so vested as a mere trustee.

The question in this case turns entirely on the point which of these two views of the law is correct? If at the death of Lord *Elphinstone* the lands of *Duntiblae* were liable to be attached by his creditors for debts incurred after his accession to the peerage, then they constituted part of his estate at his death, within the 106th section of the Act. If, on the other hand, he, at his death, though feudally vested in these lands, was only so vested as a trustee for his sister, then they would not be, according to the 106th section, part of "his heritable estate," and so could be transferred by an order of the Lord Ordinary made under that section. The Judges all treat this as a new question; there is little or no authority to guide us, and we must look only to the general principle.

I am of opinion that the Lord Ordinary was right. In the case on the original entail of the *Wigton* lands (1) it was decided, that from the time when *John Fleeming* succeeded to the peerage he ceased, *ipso facto,* to be entitled to the rents and profits of the lands comprised in that entail; that an obligation attached on him forthwith to convey to his sister as the next heir of entail; that he thus became a mere trustee; and that she was entitled to all the rents accruing after the happening of that event. The language of the entail of the *Duntiblae* lands is the same as that of the Earldom of *Wigton,* though it never was recorded. Now concurring, as I do, in the propriety of the decision which all the Judges came to in the *Wigton* case, I must of necessity hold that it governs that now before us, unless the circumstance that the entail was not recorded makes a difference. I am unable to come to the conclusion that this circumstance does make a difference in the question now to be decided. The want of its being recorded, if recording was necessary, left it open to any heir of tailzie in possession to aliene, to burthen with debts, or to alter the order of succession. But it did not in any other manner affect the entail. It made the irritancies ineffectual; but the clause carrying over the estate in the event of the tenant in tail succeeding to a peerage

(1) 3rd Series, vol. iv. p. 353.

was no irritancy, it was a condition making it the duty of the tenant in tail, on the happening of the specified event, to denude forthwith, and without further proceedings, in favour of the next heir named in the entail. That next heir took the estate with incidents very different from those affecting the *Wigton* lands. The lands of *Duntiblae* passed to her burthened with the debts of her predecessor. Still they passed to her, and when she made up a title to them as heir of tailzie and provision to her brother, she must be considered as clothing herself with the same estate as she would have had if he, on succeeding to the peerage, had at once conveyed the estate to her, and she had made up her title to the same accordingly.

The majority of the Court below seem to me to have fallen into an error in supposing that this case is governed by those of *Smollett* v. *Smollett* (1), and *Ross* v. *Drummond* (2). It follows, certainly, from those cases that, disregarding the argument that the tailzie of *Duntiblae* must be treated as if it had been recorded, so long as *John Fleeming* stood infeft as heir of tailzie in possession his estate was liable to his creditors. But from the moment of his succeeding to the peerage he ceased *ipso facto* to be tenant in tail. This was apparent on the face of the title as recorded in the register of sasines, and any person becoming his creditor after that event must have known, if he had looked into that register, that he was trusting a person who was no longer tenant in tail, for an event had occurred which made it his duty to denude in favour of another person. On these short grounds I have come to the conclusion that the interlocutor of the Lord Ordinary was right, and so that those of the Inner House ought to be reversed.

I have hitherto, my Lords, proceeded on the supposition that the entail of *Duntiblae* was not duly recorded, and so that *John Fleeming* was able, before he became Lord *Elphinstone*, to burthen *Duntiblae* with his debts. But I must now call your attention to an argument on behalf of the Appellant which, if sound, disposes of the whole case in his favour, independently of the grounds on which I have proceeded.

The Appellant contended that the 17th section of the 20 Geo. 2,

(1) Morr. App. *voce* Taillie, No. 12. 14 May, 1807.

(2) 6 Sha. & Dun. 945; 14 Sha. & Dun. 454.

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c. 50, made it unnecessary to record the deed by which the lands of *Duntiblae* were entailed, for that every person looking at the register of sasines would have express notice that the lands included in this tailzie were to be treated as if they were to all intents and purposes part of the lands comprised in the original *Wigton* entail, and, therefore, as if they were duly recorded; and so that no creditor or singular successor could acquire any right against the lands of *Duntiblae*, any more than he could against the lands included in the *Wigton* entail. If this argument is well founded the creditors of Lord *Elphinstone* who became creditors before his accession, have no more right against these lands than those who became so after that event.

This question, however, is not open to us for decision on the present appeal. Whether the argument be or be not well founded, I have come to the conclusion, on the grounds I have already stated, that the lands of *Duntiblae* were not at the death of Lord *Elphinstone* lands which under an order of the Lord Ordinary would pass to the trustee under the bankruptcy by virtue of the 106th section of the *Sequestration Act*. That is all which can be decided in this action. If this latter argument of the Appellant be sound, they passed to the Appellant free from any claim of creditors; if it be not sound, then they are liable in the hands of the Appellant to all debts of Lord *Elphinstone* incurred before his accession to the peerage. Which of these views of the law is correct cannot be decided in this action. At all events, the interlocutors below were wrong, and must be reversed.

LORD CHELMSFORD:—

When the succession to the peerage opened to Lord *Elphinstone* he ceased to have any estate except as a trustee for the conditional substitute. The general principle of every Bankrupt Act is, that the person in whom the estate vests for distribution under the bankruptcy takes the property of the bankrupt exactly as he himself held it. Lord *Elphinstone* at the time of his death was a mere trustee under a condition to denude in favour of Lady *Hawarden*, consequently the estate could only vest in the trustee under the sequestration subject to this condition. But it is contended that by the express words of the Scotch *Bankruptcy Act*, the lands in

question vested in the trustee for the benefit of the creditors, as they were at the time of Lord *Elphinstone's* death "capable of being affected by diligence or attached for debt." But it appears to me that these words in the interpretation clause of the Act are nothing more than a general description of the species of property which the sequestration is to embrace, and that they apply to the point of time when the sequestration is awarded. Now, the lands in question, after the occurrence of the conditional event on which the continuance of Lord *Elphinstone's* estate depended, could not have been rendered liable to be affected by diligence, or to be attached for debts subsequently incurred by him. Consequently, at the time of his death the property did not belong to him in this sense, although before his accession to the peerage it was chargeable, and actually charged by him, with his debts.

The question must be determined, not upon the interpretation clause, but upon the 102nd section of the Act, which vests the property of the bankrupt in the trustee, and defines the extent of his right.

It appears to me, therefore, that the lands in question were not part of the heritable estate of the bankrupt which, within the meaning of the *Bankrupt Act*, would vest in the trustee for the benefit of the creditors.

I am therefore of opinion that the interlocutors appealed from ought to be reversed.

LORD WESTBURY:—

As the deed of October, 1847, was not recorded in the register of tailzies, the late Lord *Elphinstone* was, on the face of his titles, unlimited fiar of the estate of *Duntiblae*, subject only to the clause of devolution; but he was personally bound by the obligation arising from the enactments contained in the public Act of the 20 Geo. 2, to the effect that the estates bought with the proceeds of the sale of the superiorities by such Act authorized to be sold should be settled to the same uses, and with the same limitations and restrictions, as those of the original *Wigton* deed of entail; and the question is, what effect upon Lord *Elphinstone's* ownership resulted from this obligation?

The doctrine of trusts has the same origin, and rests on the same

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principles, both in Scotch and English law; and it is desirable that it should be developed to the same extent in both systems of jurisprudence.

When the Act of the 20 Geo. 2, c. 50, enacted that the moneys to arise from the sale of the superiorities thereby authorized to be sold should be laid out by the trustees in the purchase of other estates to be settled to the same uses, and with the same limitations and restrictions as before the sale thereof, there was created a valid trust which bound all persons taking any estate or interest in the newly-purchased lands. No person could rightfully claim or assert an estate or right in or over the purchased estates inconsistent with this obligation. It was the duty of all persons interested to have the purchased lands strictly and validly entailed in like manner as the heritages sold were entailed. This trust affected not only the trustee *Turnbull*, but also the heirs of tailzie, who became vested and seised in the newly-purchased lands by virtue of the statute and of the deed of tailzie of the 4th of October, 1847.

If that deed had been duly recorded in the register of tailzies, as it ought to have been, in pursuance of the statute, the trust and obligation created and imposed by the Act would have been fulfilled and exhausted. But as this was not done, the trust or obligation to comply with the statute remained in full force; and although *John Fleeming*, after he had made up his titles to the newly-purchased lands, under the deed of the 4th of October, 1847, was, on the face of his titles, unlimited fiar, yet, except in the case of a singular successor without notice, he could not rightfully convey any larger estate in the purchased lands than he would have been enabled to do if the deed of October, 1847, had been duly entered in the register of tailzies.

The right of a trustee under a sequestration is very different from the right of a singular successor; for it is a rule common both to English and Scotch bankrupt law that the trustee or assignee takes the property of the bankrupt subject to all the rights and equities that affected it at the time of the bankruptcy. But the singular successor is not bound by a trust or duty of which he had no notice. The trustee under a sequestration is in the same position as a gratuitous alienee. He takes such estate or interest only as the bankrupt can lawfully convey. So in *England*

the assignee takes such interest only as the bankrupt can lawfully depart withal. The force of the two expressions is the same, and the implied conveyance to the trustee or assignee ranks no higher than a gratuitous alienation.

It is said that the duty imposed by the statute of Geo. 2 was a personal obligation, and not a trust; but an obligation to do an act with respect to property creates a trust; and if a fiar, bound to fulfil an obligation, acquires or retains, by means of his neglect of that duty, a greater estate than he would otherwise have had, he is a trustee of such excess of interest for the benefit of the persons who would have been entitled to it if the obligation had been duly fulfilled.

This is a very plain and righteous principle, which is of the greatest use in the administration of justice. It does not interfere with any system of feudal or legal ownership. It is said, and said correctly, that the trustee under a sequestration may claim not only what the bankrupt may lawfully convey, but also what the creditors might attach. But the same principles apply. The creditors cannot attach or take in execution any estate of which the bankrupt is a trustee. They can attach such interest only as the bankrupt is beneficially entitled to.

If these propositions are well-founded, it follows that no interest whatever in the estate of *Duntiblae* could pass to the trustee under the sequestration.

The same conclusion is arrived at on another view of the case. According to the true construction of the Scotch *Bankruptcy Consolidation Act* (19 & 20 Vict. c. 89), nothing passes to the trustee under a sequestration against a deceased debtor, except such property as the debtor was beneficially entitled to at the time of his decease. This construction seems to be admitted. Had, then, the debtor (the late Lord *Elphinstone*) any beneficial estate or interest in the lands of *Duntiblae* at the time of his decease? By the clause of devolution already referred to (which is found in the *Wigton* entail, and was repeated in the deed of October, 1847, and is set forth in all the titles made up by the late Lord *Elphinstone* as they are recorded in the register of sasines, the late Lord *Elphinstone* became bound on his accession to the peerage (on the 19th of July, 1860) to denude himself of all right, title, and interest which

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might be competent to him of the lands of *Duntiblae*,—that is, in simple language, he became bound to convey the lands of *Duntiblae* to the next heir of tailzie. Whilst this obligation remained unfulfilled, Lord *Elphinstone* was a trustee of the lands included in the obligation. The observations already made are directly applicable. An obligation to convey land to another is, beyond doubt, a trust, and whilst the party bound by the obligation retains possession of the lands, he holds them in a fiduciary character. There would be a great failure of justice if this were not the conclusion of law.

But this is not the only effect of the clause of devolution, for it goes on to declare that the same (*i.e.*, the lands) shall thenceforth (from the accession to the peerage) *ipso facto* accresce and devolve upon the next heir of tailzie in existence for the time being, &c. which is, in effect, a transfer of the beneficial ownership.

It seems clear, therefore, that the lands of *Duntiblae*, although the late Lord *Elphinstone* did not formally and legally denude himself of them during the short time that he lived after his accession to the peerage, formed no part of his heritable estate or property at the time of his decease; and that no right to them passed under the sequestration.

I am, therefore, of opinion that the interlocutor complained of should be reversed, and the Petition of the trustee dismissed with expenses.

LORD COLONSAY:—

The views which have been now stated with reference to this case are those to which the consideration I have given to it have also led my mind. It appears to me that the only question we have to determine is, whether, under the provisions of the Scotch *Bankruptcy Act*, and having regard to the position in which the *Duntiblae* estate stood at the date of *John Fleeming's* accession to the peerage, the trustee in bankruptcy is entitled to have that estate conveyed to him. It appears to me that that is a demand which he is not entitled to make. I do not wish to say a word that would in any degree interfere with the judgments that were pronounced in *Smollett* v. *Smollett*, *Ross* v. *Drummond*, and some other

cases. I hold them to involve a principle which is perfectly sound, namely, that where a party holds an estate under a deed of entail which is not recorded, and where he has contracted debts, the creditors may attach that estate. But that principle is applicable merely to the case, in the first place, of an entail in the ordinary form, and without any special conditions such as occur in this entail. And, in the second place, it has reference only to the right of creditors themselves individually to proceed against the estate. It does not necessarily give the right to the trustee in bankruptcy to demand the estate, which is the demand here made. Nor does it necessarily give a right to demand the estate where there are conditions in the deed such as appear here.

I am also of opinion that the clause of devolution (as it is called here) was one which was of the quality of the right which *Fleeming* possessed in the estate, and that from the time that that clause became operative, by his succeeding to the peerage, the estate was no longer to be regarded as his property. He held it under the feudal title, but he held it merely because the title had been so made up, but made up with the quality to which I have alluded, and from that time forward the real property in the estate belonged to the party to whom it had devolved; and he only held the feudal title as trustee for the benefit of that party. That being so, I think it would follow that debts contracted by him subsequently to that date could not be made chargeable on the estate.

But perhaps that might not be conclusive of this question if some of the views that have been stated in the Court below be sound, namely, that whether or not the estate was liable for the debts contracted after he became a peer, at all events the demand of the trustees can be supported for the debts contracted previously to that event. I differ from that entirely. The demand of the trustees is a demand to have possession of the whole estate in order that it may be disposed of and distributed; and it is not a good ground for that demand that there exists a certain class of creditors who have a right in that estate, and another class who have none. Take, for instance, this case. Suppose that at a certain date a party applies to have an unrecorded entail recorded, and it is recorded accordingly, it was liable for debts contracted

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previously to that date, but it was not liable for the debts contracted after that date; suppose, in that state of matters, the trustee had demanded the conveyance of the estate to the effect of paying the debts which had been contracted previously to the recording of the entail, it is quite clear that he could not have it. I am, therefore, very clearly of opinion that this condition or quality of the right which appeared on the face of the title was a sufficient obstacle to any demand such as we have here. It has been said that this was not truly a condition of the right. The expression "condition of the right" is used in various senses; and in certain views it is not similar to certain other conditions. If it was a quality of the right, it was not a matter necessarily connected with the entail, but it was a quality of the right on the face of the title; and if I am right in holding that from the time that *John Fleeming* succeeded to the peerage he held the estate as trustee, then it is clear that this was a trust, not latent, but a trust patent on the face of his right, a trust which every one becoming his creditor on the faith of his having a feudal investiture was bound to know, for there it stood open and patent.

Questions have been raised as to whether the doctrine of latent trusts does or does not apply in cases of feudal investiture. I do not think it necessary to solve that question here, because here the trust is patent on the face of the title of *John Fleeming*.

But another question has been raised—a very large one—which has been particularly spoken to by my noble and learned friend on my right (1) as to the effect of the statute of the 20 Geo. 2. I regard that as a very important question, but it is one which has not been so fully argued before us as to entitle me to pronounce any opinion on it now (2). Nor do I think it necessary for the present purpose; because I see enough in the trust created by the succession to the peerage to put an end to this demand on the part of the trustee. If the case should take another form, as it may do by the demands of individual creditors to proceed against the estate, that question will be open for the consideration of the Court, and I think it is well that the point has been so stated

(1) Lord *Westbury*.

(2) The argument of Sir *Roundell Palmer* was strongly to the effect that the 20 Geo. 2, c. 50, imposed a trust to keep up the entail—"a trust of the very highest nature."

by my noble and learned friend as to put it in the view of all the parties.

My Lords, I concur in the judgment that has been proposed.

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THE JUDGMENT:—Ordered and Adjudged, that the said interlocutors complained of in the said appeal be reversed: and it is hereby declared that the Petition of the said *James Howden*, presented to the Lord Ordinary on the 10th of March, 1866, praying that certain lands, in the proceedings mentioned, should be transferred to and vested in him as such trustee, ought to be dismissed with expenses; and it is further Ordered, that any expenses in the Court below which may have been paid by the Appellants to the Respondent under any of the interlocutors hereby reversed, be repaid by the said Respondent to the said Appellants: and the cause is remitted back to the Court of Session to do therein as shall be just and consistent with this declaration and judgment.

Solicitors for the Appellants: *Tatham & Proctor.*
Solicitors for the Respondent: *Connell & Hope.*

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SIR JOHN STUART OF LOCHCARRON . . APPELLANT;
McBARNET OF TORRIDON . . . . . RESPONDENT.

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*July* 21.

*Salmon Fishing—Right of Challenge.*

It would seem that even a *primâ facie* title to fish for salmon on one side of a river will give a right of challenge against fishing for salmon on the opposite side.

*Net and Coble.*

An ambiguous right of fishing may, upon evidence of user, be construed to embrace a right of *fishing for salmon*; and it is a mistake to suppose that for this purpose the evidence must establish the specific user of net and coble.

*Costs of Appeal.*

Where the decision below has been materially varied, the more just course is to give no costs to either party.

THE river *Balgy*, in *Ross-shire*, after running for about a mile between the estate of *Balgy*, belonging to the Appellant, and the estate of *Torridon*, belonging to the Respondent, falls into the sea.

In 1861 the Appellant asserted an *exclusive* right to fish for salmon in the *Balgy* and in the linn thereof.

The Respondent, on the other hand, insisted that he was en-

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titled to fish for salmon from his own side of the river; and he obtained an interdict from the sheriff to protect the enjoyment of his rights.

In 1863, the Appellant commenced an action in the Court of Session against the Respondent, to have it found and declared that the Appellant had the "sole and exclusive right and privilege of fishing for salmon and fish of the salmon kind in the river *Balgy*;" and that the Respondent had no such right.

The Respondent put in a defence; and upon proof taken, the Court of Session ultimately, on the 23rd of November 1866, gave judgment, with expenses, against the Appellant, who thereupon appealed to the House.

Sir *Roundell Palmer*, Q.C., and Mr. *Cotton*, Q.C., were heard for the Appellant.

The *Lord Advocate* (1), and Mr. *Balfour*, for the Respondent.

The case turned entirely on the construction of documents, and on the evidence as to user; the Law Peers delivering their opinions at great length to satisfy the parties (2).

The following remarks are selected from the opinions of the Law Peers:—

THE LORD CHANCELLOR (3):—

My Lords, it is unnecessary to consider whether in strictness, if the Respondent had shewn nothing more than what was termed in the argument a *primâ facie* title, the Appellant could have required the Respondent's title to be examined. I have assumed, and I think it much safer to assume, that the Appellant has that right; and it seems to me that reason and common sense require that a person in the position of the Appellant, with reference to a salmon fishing of this kind, should have the right of challenging a claim to fish from the opposite side of the river.

I have, however, assumed that in favour of the Appellant; and, assuming that, I have certainly come to the conclusion that upon the titles themselves the right of the Respondent to the salmon

(1) Mr. *Gordon*.

(2) The case as decided below is reported in the 3rd Series, vol. v. p. 753; and in the Scottish Jurist, vol. xxxix. p. 321.

(3) Lord *Cairns*.

fishing is made out. It becomes, therefore, unnecessary to consider what has been the usage and practice, because if the Respondent's right exists upon charter, it certainly could not have been lost *a non utendo*.

I do not think that any serious argument can be based upon the term "*piscariis*," occurring in these title deeds, as distinguished from "*piscationibus*." It would, I apprehend, be very unsafe, having regard to the authorities, to hold that "*piscariis*" is in any sense a larger word than "*piscationibus*," so as to dispense with the ordinary proof of user which is necessary in order to give to "*piscationibus*" the power and force of carrying a fishing for salmon.

I therefore should propose to your Lordships to affirm the whole of the interlocutors appealed against, except one proposition contained in the interlocutor of the 23rd of November, 1866, which I think will require some alteration. That proposition proceeds not so much upon the titles of the Respondent as upon the exercise by the Respondent of the right or usage of salmon fishing. I propose that it shall be rested entirely upon the titles of the Respondent thus:—

That from the year 1668 the Respondent and his predecessors and authors have, in virtue of titles flowing from the Crown, stood infeft in the lands of *Torridon* and others, with, *inter alia*, the half of the salmon fishing of the water of *Balgy* and linn thereof.

Making this alteration, which is a substantial one, I should humbly advise your Lordships that no costs of the appeal should be given to either side.

The *Lord Advocate*:—We got costs in the Court below.

THE LORD CHANCELLOR:—My Lords, upon every occasion, in dealing with costs (which in many appeals, and perhaps in this; are the most substantial part of the case), we should act upon a uniform principle. I look upon the litigation here as a whole, although in point of form there has been a separate appeal. We alter the finding of the Court below in one very material respect; because, in place of basing the right of the Respondent upon usage, we have based it upon his titles. Under these circumstances the more just course is to give no costs to either party.

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LORD CRANWORTH commented upon the evidence at considerable length, and concluded by expressing his concurrence in the judgment proposed by the Lord Chancellor.

LORD CHELMSFORD also went fully into the evidence, agreeing throughout with the Lord Chancellor.

LORD WESTBURY:—

I am decidedly of opinion that the Respondent has proved a title derived from the Crown to one-half part of the salmon fishings of the *Balgy*. No evidence of enjoyment is needed; but I may be permitted to say that although it is true in the law of *Scotland*, as an affirmative proposition, that an ambiguous grant of *piscationes* alone may certainly be interpreted into a *jus piscandi salmones* by evidence of user by net and coble, yet I do not apprehend the law of *Scotland* to warrant the negative proposition that no evidence whatever, except user by net and coble, would be sufficient to establish it. That, however, is a mere *obiter dictum* not necessary for the determination of this case.

I assent, therefore, to the proposition of my noble and learned friend on the woolsack that the title under the Crown grant, not a title by enjoyment and immemorial possession, but the title under the Crown grant, should be made the foundation of the Respondent's right; and in so far altering the decision below, these appeals, I think, ought to be dismissed without costs.

LORD COLONSAY:—

I also have arrived at the conclusion that the title of the Respondent may be traced up to the Crown. That being so, it is unnecessary to go further in order to shew that he has a right to one-half of these salmon fishings, and that he is entitled to resist successfully the demand of the Appellant. My opinion, as it formerly stood on that matter, has had much more confidence given to it since I have had an opportunity of seeing in print the older titles on which it rests. When I had to consider the case formerly, those documents were not printed (1).

(1) Lord *Colonsay*, as President of the Court of Session, had joined in the decision appealed from.

The Appellant's right to one-half of these fishings is, I think, clear, and proved by user to have been a right of salmon fishing. I had no doubt of that from the commencement of the case.

Some other points have been noticed, as to which I would rather avoid expressing any opinion, because I do not think they are necessary to this case. One of these was as to the right that the Appellant would have had to challenge the right of the Respondent if he had himself not contended for an exclusive right of fishing. I think there are points connected with that question which have not been fully developed, and I would rather avoid expressing any opinion upon it.

Some of my noble and learned friends have expressed an opinion that it is not necessary in all cases with a view either to convert a right of fishing into a right of salmon fishing, or to establish a right of salmon fishing as against the Crown, that there should be an exercise of that right by net and coble. I entirely concur.

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JUDGMENT AS TO THE INTERDICT.

After hearing Counsel upon the appeal of the Hon. Sir *John Stuart*, complaining of an interlocutor of the Sheriff Substitute of *Ross* and *Cromarty*, of the 5th of July, 1862, in so far as interdict was thereby granted; also of an interlocutor of the Lord Ordinary; also of an interlocutor of the Lords of Session of the First Division, of the 23rd of November, 1866; it is Ordered and Adjudged that the said interlocutors, in so far as complained of in the said appeal, be, and the same are hereby affirmed, and that the said appeal be dismissed this House.

JUDGMENT AS TO THE RESPONDENT'S TITLE.

Ordered and Adjudged that the third proposition or finding in the said interlocutor of the 23rd of November, 1866, be altered as follows, viz.: That from the year 1668 the Defender (Respondent) and his predecessors and authors have, in virtue of titles also flowing from the Crown, stood infeft in the lands of *Torridon* and others, with, *inter alia*, "the half of the salmon fishing of the water of *Balgy* and linn thereof," conform to the wadset of 1668 and the other writs produced, and which are referred to in the statement of facts in the Defender's (Respondent's) behalf; and that the said interlocutor, with this alteration, so far as complained of, be affirmed, and that the said appeal be dismissed this House: And it is further Ordered, that the cause be remitted back to the Court of Session in *Scotland* to do therein as shall be just, and consistent with this alteration and this judgment.

Solicitor for the Appellant: *Alexander Dobie.*
Solicitor for the Respondent: *John Graham.*

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July 23.

BARSTOW . . . . . APPELLANT;
BLACK *et al.* . . . . . RESPONDENTS.

PATTISON . . . . . APPELLANT;
HENDERSON *et al.* . . . . . RESPONDENTS.

*Reduction ex capite Lecti.*

2 H I L 399

An heir-at-law has no title to sue a reduction *ex capite lecti* unless he can shew that, but for the deed sought to be set aside, he must succeed to the property.

An heir of substitutionary provision may sue a reduction *ex capite lecti* where he can shew that, as such heir, the deed sought to be set aside prejudices his interests.

*Absolute Ownership—Conditional Substitution.*

The position of an absolute unlimited owner subject to a conditional gift over is unknown to the law of *England*, but well known to the Scotch law.

Hence in *Scotland*, although a conveyance to a man "and his heirs and assigns whomsoever" makes him an absolute owner or fiar, there may follow a valid conditional substitution or gift over to which, on the occurrence of the contemplated events, effect will be given.

*Dominium directum—Dominium utile—Consolidation.*

Where by a testamentary settlement the *dominium directum* of an estate had been given to *A.*, the settlor subsequently acquiring the *dominium utile;* and where *A.*, after coming into the estate, consolidated the *dominium utile* with the *dominium directum:—Held* by the House (Lord *Cranworth* dissenting), that a conditional substitution or gift over, on taking effect, did not embrace the consolidated *plenum dominium*, but was still limited to the *dominium directum.*

*Per* Lord *Westbury:*—The *plenum dominium* may again be severed, and the conditional substitute will thus have all that he is entitled to under the testamentary settlement.

In 1830 *William Dunn*, a bachelor, made a testamentary disposition and settlement of all his estates, conveying them absolutely to his brother, *Alexander Dunn*, and the heirs and assignees whomsoever of the said *Alexander Dunn;* subject to certain burdens and conditions;—making *Alexander Dunn* his sole executor;—but declaring that if he (the said *Alexander Dunn*) should die childless and intestate, the estates devised to him by *William Dunn* should go to other specified parties.

The deed contained a special clause providing that in the event of *Alexander Dunn* dying childless and intestate the superiority, or

*dominium directum*, of one of the testator's estates, called *Boquhanran*, should devolve upon the eldest son of his niece, namely, the Appellant, Mr. *Alexander Dunn Pattison*.

Subsequently to the execution of this deed *William Dunn* purchased the *dominium utile* of *Boquhanran*. He died in 1849, and was succeeded by his brother *Alexander*, who feudally consolidated the *dominium utile* with the *dominium directum*.

In 1860, being then on his death-bed, *Alexander Dunn* executed a deed conveying his estates to trustees upon certain trusts. He died childless, but leaving his heir-at-law, a lunatic, whose curator brought the first action in the cause to have the deed of *Alexander Dunn* set aside *ex capite lecti*. The Court of Session decided that the lunatic heir was not in a situation to sue this reduction, because, supposing the deed set aside, the lunatic heir would still be excluded. His curator thereupon appealed to the House.

The second action was instituted by Mr. *Alexander Dunn Pattison* to reduce the deed of *Alexander Dunn*, also *ex capite lecti*.

The Court of Session sustained Mr. *Pattison's* title to reduce, but only to the effect of enabling him to vindicate his claim to the *dominium directum* of *Boquhanran;* whereas he contended that by virtue of the consolidation he was entitled to the *dominium plenum*. Against the judgment of the Court of Session he appealed to the House.

Sir *Roundell Palmer*, Q.C., the *Dean of Faculty* (1), and Mr. *James Anderson*, Q.C., were of counsel for Mr. *Barstow*, the curator.

Mr. *Pearson*, Q.C., and Mr. *George Young*, Q.C., for Mr. *Pattison*.

The *Lord Advocate* (2) and Mr. *Mellish*, Q.C., with Mr. *J. T. Anderson*, and Mr. *Druce*, Q.C., with Mr. *Boyd Kinnear*, for residuary legatees and parties who had presented cross-appeals.

The case, as decided below, is very fully set out in three distinct reports of the 3rd Series (3), while the arguments of counsel at the Bar of the House, and the facts of the case, are all stated and commented upon in the following opinions:—

(1) Mr. *Moncreiff*. (2) Mr. *Gordon*.
(3) Vol. iii. p. 779; and vol. iv. pp. 595 and 1104.

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BARSTOW v. BLACK.

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THE LORD CHANCELLOR (1):—

My Lords, the first of these appeals has arisen out of an action brought by the *curator bonis* of *William Park*, a lunatic, the heir-at-law of *Alexander Dunn*,—to reduce, *ex capite lecti*, a disposition made by *Alexander Dunn* of certain heritable property to which he had succeeded under a disposition made by his brother, *William Dunn*.

That the deed of *Alexander Dunn* was a death-bed deed was not denied by the Defenders. But they contended that by the law of *Scotland* the heir cannot reduce a deed, *ex capite lecti*, unless he can shew himself to be damnified by it; that is to say, unless he can shew that if the death-bed deed were reduced he, the heir, would take the property; whereas, in this case, they affirmed, that if *Alexander Dunn's* deed had not been executed, or were to be set aside, the heir of *Alexander Dunn* would not take the property, but it would go over, under the deed of *William Dunn*, to other parties.

The *curator bonis*, on the other hand, insisted that the limitation over in the deed of *William Dunn* was inoperative, and that its first or ruling disposition to "*Alexander Dunn*, his heirs and assignees whomsoever," remained undisturbed, and gave the lunatic heir a right to reduce the death-bed deed.

The Lord Ordinary, by his interlocutor of the 10th of January, 1865, decided in favour of the lunatic heir's right to reduce. This interlocutor was recalled by the Second Division on the 27th of March, 1865, their Lordships sustaining the objections to the title of the lunatic heir, whose curator now appeals to your Lordships.

We have therefore to determine the construction and operation of the deed of *William Dunn*. It is dated the 17th of April, 1830, and is a disposition and deed of settlement, not by way of trust, but operating as a *de presenti* feudal conveyance, opening as follows:—

> I, *William Dunn*, . . . . . do give, grant, dispone, alienate, convey, and make over from me, after my death, to and in favour of *Alexander Dunn, and his heirs and assigns whomsoever*, all and sundry lands, &c., . . . . . with and under the burdens and conditions following:—

Then follow provisions as to various legacies and annuities, and

(1) Lord *Cairns*.

an appointment of *Alexander Dunn* as executor. The deed next proceeds thus:—

Declaring, as it is hereby specially provided and declared, but without prejudice in any respect to, or limitation of the rights and powers of, the said *Alexander Dunn* (under and by virtue of the conveyance in his favour before written, to exercise the most full and absolute control in the disposal of the said estates and effects, either during his lifetime, or by settlements or other writings to take effect at his death), that in the event of his dying intestate, and without leaving heirs of his body, and of his not otherwise disposing of the subjects and estates hereby conveyed to him, the same shall fall and devolve, and accordingly I do hereby in these events, but under the burdens and provisions before written, dispone, alienate, and convey my said subjects and estates, heritable and moveable, to the persons and in the terms after mentioned.

A specification follows of the persons to whom and among whom the property was to go over and be divided in the events thus described, among whom are the Respondents, or some of them.

In the argument at your Lordships' Bar it was strenuously urged on behalf of the Respondents that the disposition to "*Alexander Dunn*, his heirs and assigns whomsoever," must be read as a disposition to *Alexander Dunn* and the *heirs of his body*. The deed, it was argued, would thus run aptly and consistently as a disposition to *Alexander Dunn* and the heirs of his body, with a regular and proper substitution on the termination of *Alexander Dunn's* estate tail by failure of heirs of his body at his death.

After a careful consideration of the arguments in support of it I find myself wholly unable to adopt this construction. In the first place, the words "heirs and assigns whomsoever" appear to me to be words which would naturally be used not as the equivalent of, but in contradistinction to, the words "heirs of the body;" and in this sense, as the Lord Justice Clerk says, they have in Scotch conveyancing a technical meaning which never varies (1). In the next place, after doing violence to the words "heirs and assigns whomsoever" by reducing their import to the meaning of "heirs of the body," we should not even then have reconciled the first disposition with the limitation over, inasmuch as the limitation over is to take effect, not on failure of heirs of the body generally, but only in the event of *Alexander Dunn* not "leaving" heirs of his body; that is, as was admitted, leaving heirs of his body at his death. Assuming, however, that a general disposition to *A.* and his heirs,

(1) 3rd Series, vol. iii. p. 796.

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followed by a limitation over if *A.* die without heirs of his body, might be moulded into a disposition to *A.* and the heirs of his body, I am not aware of any authority for doing this where the limitation over is to take effect not merely on *A.*'s dying without heirs of his body, but on the further concurrence of another event, namely, the non-disposition, either *mortis causâ* or *inter vivos*, of the property by *A.*

Rejecting, therefore, as I am compelled to advise your Lordships to do, this construction, I have next to inquire whether there is anything to prevent the disposition taking effect according to the natural meaning of the words used in the deed. No person reading over this deed could, in my opinion, entertain any doubt that what *William Dunn* meant was that his brother *Alexander* should be, to all intents and purposes, absolute fiar and owner of the estates, with absolute powers of disposition; but that if he should not dispose of the estates, and should die childless, they should go over. This limitation over is one which, in my opinion, would, in an English deed or will, be invalid, because by English law you cannot, generally speaking, make a man absolute owner of an estate, and at the same time make a gift or limitation over of it dependent on the absolute owner not exercising his rights of ownership by disposition. The position of an unlimited fiar with a conditional gift over is unknown to the English law; but the position of an unlimited fiar—that is, a fiar with unlimited power of ownership and disposition—followed by substitutions or limitations over, is well known to the Scotch law. It would, in my opinion, have been a perfectly good disposition to settle these estates on *Alexander Dunn*, his heirs and assigns, with a limitation over to other persons in the event of *Alexander Dunn* dying childless. Under such a settlement *Alexander Dunn* would have had an absolute power of disposition over the estates. And, in my opinion, the words of apparent contingency, "in the event of his not disposing of the estates," are no more than a recognition of that power of disposition which was, by Scotch law, inherent in the estate given to *Alexander Dunn*.

I therefore propose to move your Lordships that the interlocutor of the 27th of March, 1865, pronounced in the first action, should, with one variation which I shall afterwards mention, be

affirmed, and the appeal of *Barstow* in that action dismissed, with costs.

In the second of these appeals another question has arisen. The disposition over in *William Dunn's* settlement professed to carry to Mr. *Dunn Pattison*, as the eldest son of *Janet Pattison*, the superiority of *Boquhanran*. *William Dunn*, after the date of this settlement (1), acquired the *dominium utile* of *Boquhanran*, and this *dominium utile* passing to *Alexander Dunn*, he (*Alexander Dunn*) completed his title to it in 1852, and by proper instruments effected a consolidation of the *dominium utile* with the *dominium directum*, which at that time belonged to him under the leading disposition in *William Dunn's* deed. Mr. *Dunn Pattison* contends that this consolidation has enured to his benefit, and that he is now entitled not to the superiority of *Boquhanran* merely, but to the *plenum dominium* of *Boquhanran*, or, in other words, to the superiority *plus* the *dominium utile*. That the destination of the *dominium utile* to the residuary legatees in the settlement of *William Dunn* was evacuated by the acts of *Alexander Dunn* I have no doubt; but the argument that Mr. *Dunn Pattison* can benefit by this evacuation I feel compelled, after much hesitation, to reject. I think the conclusion of the majority of the learned Judges in the Court of Session was, on this question, also correct, and that Mr. *Dunn Pattison* was never intended by *Alexander Dunn* to have more, and that he cannot claim more, than what the deed of the 17th of April, 1830, gives him, namely, the superiority of *Boquhanran* without the *dominium utile*, which *dominium utile* must be severed from the *dominium directum* for the benefit of *Alexander Dunn's* heir-at-law. The reasons which lead me to this conclusion are those given by Lord *Cowan* and the Lord Justice Clerk, which I do not think it necessary to repeat (2).

This limited right of *Alexander Dunn's* heir-at-law as to the *dominium utile* of *Boquhanran* was, as it seems to me, either overlooked by, or not sufficiently pressed upon the Court when the interlocutor of the 27th of March, 1865, in the first action, was made, and a variation must now be made in that interlocutor in order to sustain the right of the heir of *Alexander Dunn* to reduce the death-bed deed *quoad* the *dominium utile* of *Boquhanran*.

(1) 17th of April, 1830.

(2) 3rd Series, vol. iv., pp. 1108 & 1118.

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Had the appeal in the first action by the heir been directed merely or mainly to obtain this variation, I should have thought that no costs could be given against the heir; but as he raised in that appeal the much broader and larger question, on which he has failed, I think the first appeal should be dismissed with costs.

In the second cause, inasmuch as both the appeal and the three cross appeals have failed, I propose, my Lords, if you concur in the opinion I have expressed, that they should all be dismissed with costs.

The variation in the interlocutor, which I should humbly offer as the proper one to be made, would run thus:—

> Declare that the Pursuer, as curator for the heir-at-law of *Alexander Dunn*, has good title to sue for reduction of the trust disposition of the said *Alexander Dunn*, in so far as it conveys the *plenum dominium* of the lands of *Boquhanran*, but only to the effect of enabling the said curator to vindicate the claim of the said heir-at-law as such to the *dominium utile* of the said lands, subject to such feu duty or other rights as would have been exigible by, or have belonged to, the owner of the *dominium directum* if there had been no consolidation by *Alexander Dunn*; and remit to the Court of Session with this declaration, to proceed in accordance therewith.

Subject to this declaration and remit, I shall move your Lordships to affirm the interlocutor appealed from, and to dismiss, as I have said, the appeal with costs.

My Lords, I have reason to know that those of your Lordships who have heard this appeal, and are present, concur in a great measure with the conclusions at which I have arrived. But I have had a communication from my noble and learned friend Lord *Cranworth*, who is prevented by indisposition from attending the House to-day, in which he states that in the first appeal he concurs in the opinion which I have expressed, though he has had doubts upon it; but in the second he is unable to concur. He thinks that when *Alexander Dunn* had become absolute owner, both of the superiority and of the *dominium utile*, he caused them afterwards to go together, and that the ownership of the property must go with the superiority (1).

LORD WESTBURY:—

The first question relates to the validity of the conditional substitution contained in the deed of *William Dunn*. There has been

(1) Lord *Cranworth* died on the following day, the 24th of July, 1868.

much argument at the Bar on matters which I have always thought were well settled in Scotch jurisprudence. If a destination be made to *A.*, his heirs and assignees whatsoever, there is no room for further disposition, because the whole property and right of ownership are comprised in and exhausted by the first disposition which, in the hypothesis of law, will never come to an end. In such a case nothing remains to form the subject of ulterior ownership. But a complete disposition of this nature may be followed by a conditional substitution, that is, by a new disposition or gift, depending on a contingent event, the declared effect of which, should it occur, is to reduce, or put an end to, the anterior disposition, and give birth to a new or substitutionary gift. The condition, when purified, puts an end to the first disposition, and introduces the second.

This is the proper province of a conditional substitution. In the English law of real property it is called a conditional limitation. But there is this important difference between the two systems. By the English law the grantee in fee subject to a shifting use or conditional limitation, cannot defeat the limitation, or prevent its taking effect, but in *Scotland* the first disponee is absolute fiar, and, unless fettered, may, by alienation *inter vivos*, or settlement *mortis causâ*, make an absolute conveyance of the estate.

Various examples may be given of conditional substitutions. If lands at *X.* are disponed to *A.*, his heirs and assignees whatsoever, subject to a proviso that if the lands of *Y.* shall descend to *A.*, then the lands at *X.* shall go and be disponed to *B.* and his heirs, the descent of the lands of *Y.* is a contingency which, when it occurs, operates by way of condition to defeat the disposition to *A.* and his heirs, and gives rise to the ulterior disposition to *B.* and his heirs, which is therefore properly called a conditional substitution. So if the condition be that if *A.*, to whom lands are disponed in fee, *shall die without leaving issue living at his death*, the lands shall go and be disponed to *B.* and his heirs, the gift to *B.* is a conditional substitution, and whether it takes effect or not will be ascertained at the death of *A.* But if the disposition be to *A.*, his heirs and assignees whomsoever, and on his dying without issue then to *B.* and his heirs (an event which may not happen for several generations), the better construction would seem to be that the

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disposition to *A.*, his heirs and assignees whatsoever, shall be read as if it had been to *A.* and the heirs of his body, whom failing, to *B.* and his heirs; and thus the gift to *B.* becomes a simple and not a conditional substitution. In the nomenclature of English law the gift to *B.* and his heirs in the case supposed would be a remainder, and not a conditional limitation, the difference being that a remainder expects and awaits the termination of the antecedent particular estate, whereas a conditional limitation defeats and puts an end to it. Therefore, in English law there can be no remainder limited after an estate in fee simple, for nothing remains to be given; but an estate in fee simple may be followed by a conditional limitation. This is mere illustration, and affords no ground for conclusion in a matter of Scotch law; but there is no reason, and certainly no authority that I am aware of, in *Scotland* for holding that a destination to *A.*, his heirs and assignees whatsoever, may not be followed by a conditional substitution.

The next question is, what, according to the true construction of *William Dunn's* deed, is the condition on which the gift over depends.

In the Court below it seems to have been considered that this condition involved several contingent events; one, the event of *Alexander Dunn* making no alienation in his lifetime, and another his dying intestate. But I am not of opinion that these events form any part of the condition on which the substitution over is made to depend. I consider the words that refer to these events as not expressive of any conditions, but as amounting only to a declaration, *ex majore cautelâ*, that the disposition over, in the event of *Alexander Dunn* dying without leaving issue, should not prejudice or detract from the right of alienation which *Alexander Dunn* as fiar would possess, either by disposition *inter vivos* or by a settlement *mortis causâ*. The disposition to *Alexander Dunn* and his heirs made him absolute fiar, and gave him the right of alienation. This right is by law incident to the estate which is given. When, therefore, the deed says that the conditional substitution shall take effect if *Alexander Dunn* shall not make any alienation by deed or gift by will, these words are simply *expressio eorum quæ tacite insunt*, and say nothing more than what the law says without them. If I dispone to *A.* and the heirs of his body,

whom failing to *B.* and the heirs of his body, the gift to *B.* is at the mercy of *A.*, and depends on the event of *A.* making no alienation. If I added to the words "whom failing," these words, "and in the event of *A.'s* dying intestate, and of his not otherwise disposing of the estate," they would be words of superfluity, as expressing what the law implies, and would operate nothing.

It is not correct to say that this construction takes away all operation from the disposition to "heirs whomsoever," or renders the limitation to heirs one which never can have effect; for if *Alexander Dunn* leaves issue at his death the conditional substitution flies off, and the disposition to *Alexander Dunn* and his heirs is left in full force and integrity.

Some misuse was here made of English law. In *England* you cannot make a gift over dependent on a condition which is repugnant to the estate first given. Neither can you prohibit the first taker from doing something which it is incidental to his estate that he should be able to do, and take away the estate from him on his breach of the prohibition. Nothing of the kind occurs here. The law attaches to the disposition in favour of *Alexander Dunn* and his heirs the right of alienation *inter vivos* or *mortis causâ*, and the words of the gift over, if *Alexander Dunn* shall not have exercised this right of alienation, thereby remaining fiar of the estate, and shall die leaving no issue, are not at variance with, or derogatory from, the prior estate, but simply in affirmance of what the law has already said.

It is asked, if I dispone to *A.* and his heirs, making him absolute fiar, can I make an ulterior disposition to *B.* and his heirs in the event of *A.* not making any alienation? I am not prepared to admit that the condition and the disposition over would be bad; but that is not either the case or the true question here. The true inquiry is, first, can I dispone to *A.* and his heirs whomsoever, but if he die without leaving issue living at his death, to *B.* and his heirs? If the answer be that the disposition over is good, the second question is, whether the disposition over is made void because I add to the condition of *A.* dying without leaving issue, words expressive of that which the law implies, namely, that the gift over must depend on the prior disponee dying intestate, and without having made *inter vivos* any alienation. If the right of

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disposition attached by law to the estate of the first disponee, does not affect the validity of the conditional gift, the description or reservation in terms of that right cannot certainly have any effect. The legal mind is often the victim of its own ingenuity. The language of the deed, when read by a man of plain understanding, simply amounts to this: if *Alexander Dunn* dies without leaving issue, I make a different disposition of my estate, but this is not to affect the right of *Alexander Dunn* to dispone of the estate by deed or will.

The only contingency that gives birth to the ulterior disposition is the event of *Alexander Dunn* dying without leaving issue; and the substitution arising thereon is to take effect subject to any alienation or any valid *mortis causâ* settlement which he may have made in his lifetime.

This construction supersedes the question much argued at the Bar, whether the settlement of *Alexander Dunn* is not to be regarded as made by virtue of a specially reserved faculty, and therefore irreducible by means of the law of death-bed. There is not, in my opinion, any special faculty, but a mere reference to the ordinary *jus disponendi* which belongs to every fiar. Therefore, as the event happened which constitutes the condition, namely, the death of *Alexander* without leaving any issue, I am of opinion that the substitution took effect, and that the heir of provision entitled by virtue of that substitution has a right to reduce the settlement of *Alexander Dunn*, on the ground of its having been made *in lecto*.

The rights of all parties entitled under the settlement of *William Dunn* are personal only, that is to say, they are equitable rights, collateral to the feudal estate or title. The deed of *William Dunn* does not contain, *in gremio*, any power of feudalising the estates which are given.

The argument has been that, by virtue of certain feudal conveyances, *Alexander Dunn* has evacuated the conditional substitution, for that having by virtue of such feudal acts acquired a new estate, the personal right under the settlement is defeated, and no longer attaches on the *feodum novum*. This appears to me to be wholly unfounded, both in reason and in law. If the party who has a pure personal right under a settlement as disponee, subject to substitutions, proceeds extra the settlement to acquire a com-

plete feudal title, the right of the heir under the disposition of the personal right attaches as a trust or obligation upon the complete feudal estate. Without, therefore, examining the merits of the argument on the effect of the resignation, but assuming the feudal conveyances to have had the operation of giving a new feudal estate, I am of opinion that this does not affect the validity of the personal right.

It remains to examine another ingenious argument pressed by the counsel for the Appellant, Mr. *Pattison*. It was contended that the effect of the procuratory of resignation was to unite and blend the *dominium utile* with the *dominium directum*, so that the former was merged and lost by its union with the latter, and that Mr. *Pattison*, claiming under the deed of *William Dunn* as conditional substitute of the *dominium directum* of the lands of *Boquhanran*, was now entitled to receive them under that gift free from the *dominium utile*. In other words, that he was entitled under the gift to him of the *dominium directum* to receive the *plenum dominium*, or absolute ownership of the lands.

I apprehend that this argument is wholly unfounded. Assuming that the effect of the resignation was to merge and extinguish the *dominium utile*, the person who is the owner of the feudal *plenum dominum* by virtue of that Act, subject to the personal right given by the conditional substitution in favour of Mr. *Pattison*, may by proper conveyances sever the *dominium utile* again from the *dominium directum*, so as to be in a condition to grant to Mr. *Pattison* that which alone is given to him, namely, the *dominium directum*. If this can be made good to him, as it clearly may, he gets the benefit of the gift contained in the deed of *William Dunn*, and is entitled to no more. The case is very different from one in which two things have been wrongfully blended together, so as not to admit of separation.

These few plain remarks dispose of the different questions which were discussed at the Bar, and the result is that, in my opinion, the contention of the heir-at-law fails except as to the *dominium utile* of the lands of *Boquhanran*, but which ought not, under the circumstances, to save his being directed to pay the costs of his extended appeal; and that the contention of Mr. *Pattison* touching the right to the *dominium utile* also fails, and that his appeal ought,

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as to that, to be dismissed with costs; and that the interlocutor of the Inner House is correct and must be affirmed, but with the accompanying declaration which has been already stated by my noble and learned friend on the woolsack; and that accordingly the causes should be remitted to the Court below to do that which may be necessary to give effect to that declaration.

LORD COLONSAY:—

My Lords, in regard to the first of these appeals, that of *Barstow* as *curator bonis* to the heir-at-law of *Alexander Dunn*, it is right to look at the shape in which the case is presented to us. It is an action for reducing and setting aside the deed of his ancestor, as having been executed *in lecto*. Other parties dispute his title and interest to reduce it; and it is very clear and settled law that an heir-at-law has no title and interest to sue such a reduction if there exists any previous deed which would come into operation and prevent his getting the subject which he seeks to get.

Now, in this case the Court have held that the heir of *Alexander Dunn*, or his curator, has no title to sue reduction of *Alexander Dunn's* deed, in so far as regards certain properties, but that he has a title to sue reduction of that deed in so far as regards other properties, namely, those that belonged to *Alexander Dunn* himself. And the reason why they have found that he is not entitled to sue a reduction in regard to the property that belonged to *William Dunn* is, that *William Dunn* had, by a valid deed, given that property, by substitution, to parties who would be entitled to take the property if the deed of *Alexander Dunn* were set aside. *Alexander Dunn's* deed had been made, as regards the property which he had succeeded to from *William Dunn*, very much with a view to giving effect to what *William Dunn* himself had done by his deed.

Was the Court right in holding that the heir of *Alexander Dunn* had no title to sue that reduction so far as regarded the property which had been derived from *William Dunn?* I think it was except as regards the *dominium utile* of a certain parcel. The argument that was submitted to us in regard to the matter of this first appeal was put with great ability and great ingenuity; and the ingenuity which was involved in it, and the admixture which

was introduced of English principles, made me think it proper to put down upon paper what were my own views as regarded the simple case before us, judged by the law of *Scotland*.

The deed of the 17th of April, 1830, is a *mortis causâ* deed—the testamentary settlement of *William Dunn*, whereby he declared his intentions as to the succession to every part of his estate, heritable and moveable. As parts of his estate consisted of heritage, it was necessary that the deed should contain words of disposition, and the deed in question has such words. In considering what effect is to be given to such a deed, it is necessary to read the whole deed, and to collect from it the intentions of the testator, and if those intentions are clearly evinced to give effect to them, unless there be some legal or formal obstacle to doing so.

As to the intention of *William Dunn*, I think it is impossible to entertain a doubt, for he has stated it in express terms in a clause obviously constructed for the purpose of giving full expression to his intentions, and of giving effect to them. I do not think that the intention has been seriously questioned by any one either in the Court below or at the Bar of this House. He intended that in the event of his brother *Alexander* surviving him and dying childless without having disposed of the estates, they were then to go in certain portions to certain relatives named. That destination of his heritable estates is set forth by him with great particularity. The detail in which the different families, including *Alexander's* heir-at-law, are substituted in separate portions of the estate, excludes all room for doubt as to the settled purpose of the testator. The event of *Alexander* having died childless, and without having disposed of the estates, has happened; and the question is whether effect is to be given or to be denied to *William's* declared purpose.

Setting aside for a moment the argument founded on the words "heirs and assigns whomsoever," which occur in the early part of the dispositive clause of the deed, and looking merely to the thing itself that *William* contemplated, it was a thing not only within his competency to do, and perfectly consistent with the principles of Scotch conveyancing, but it was the thing that is done in effect, though less fully expressed, in almost every case of substitutions in heritage to a man and the heirs of his body not fenced with

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what are called fettering clauses. In every such case the first disponee or institute is unlimited fiar. He may contract debt on the estate, or he may dispose of it for onerous causes, or gratuitously by deed *inter vivos* or *mortis causâ*, but if he does none of these things, and leaves no heir of his body, the substitute first named will succeed to him, and will have the same power of disposal. It seems unnecessary to cite authority for a proposition now so elementary. It was, therefore, quite within the legal competency of *William Dunn* to settle his heritage so that it should go first to his brother *Alexander*, who should be fiar with unlimited power of disposal; and that in the event of *Alexander* dying childless, and without having disposed of the estate by deed either *inter vivos* or *mortis causâ*, it should go to certain parties pointed out as substituted in that event. It is also clear that this was what *William Dunn* intended and endeavoured to do, and that the declaration or conditional substitution upon which so much depends was introduced expressly for that purpose.

The question is therefore reduced to this, whether the words, "heirs and assigns whomsoever," in the early part of the dispositive clause, make it impossible to give effect to the intention of the testator fully and unmistakeably expressed in the subsequent part.

The Lord Ordinary does not appear to have had any doubt as to what *William Dunn* intended, but His Lordship appears to have thought "the mode" adopted ineffectual, and he says "it rather appears to him" that the deed of *William Dunn* amounts to an attempt to do something that could not be competently done. This was also the contention of the Appellants. If by that is meant that *William* could not effectually give the estate to *Alexander* and his heirs and assigns whomsoever, and at the same time not give it to them, that would be little else than a truism, and would not advance the argument. It is obvious, however, that *William Dunn* did not intend or attempt to do that. If the meaning be that the words used in the first part of the dispositive clause, viz., "heirs and assigns whomsoever," taken by themselves are inconsistent with the destination contained in the subsequent part; then, supposing that to be so, it would not necessarily, or by sound legal inference, or the rules of construction applicable to such

deeds, lead to a rejection of the latter, containing, as it does, the fullest and latest declaration of his purpose. On the contrary, the latter ought to prevail if there be an apparent conflict.

It is a mistake to suppose that because the deed begins with words of disposition to *Alexander* and his heirs and assigns whomsoever, the testator deprived himself of the power of attaching conditions to the destination to heirs whomsoever, or of qualifying, or explaining, or restricting, or altering by subsequent words, the effect that would have been due to those previous words if they had been allowed to stand without any such condition, qualification, or explanation. The whole matter was still within his power, and his whole purpose had not been finally declared. What then does he go on to do? He expressly declares his purpose to be that while he does not mean or intend to restrict the absolute power of disposal given to *Alexander*, he does mean and intend that there shall be a substitution of certain parties conditionally on, that is in the event of, *Alexander* dying intestate without issue. Notwithstanding the substitution thus made, *Alexander*, as in other cases of substitution, was unlimited fiar, and his gratuitous *mortis causâ* deed disposing of and distributing the estates could not have been challenged by any one apart from the ground of death-bed.

No particular form of words was necessary for effectuating the purpose intended; but the clause is very anxiously expressed. It combines almost every form of expression that could be suggested for giving effect to the purpose: "fall and devolve," "dispone, alienate, and convey," &c. Some of these words are perhaps superfluous, but they do not detract from the import or efficacy of the clause as a conditional substitution. The Lord Ordinary appears, from some expressions in his note, to have treated this part of the deed as if it was no part of the dispositive clause, and that idea seems to have had some influence on his judgment. But I cannot agree with him in that. I do not doubt that it is to be regarded as part of the dispositive clause, and not of any other clause, notwithstanding the parenthetical mention of certain burdens that were to affect the subjects conveyed. It does not appear to me that either the position or the phraseology of this part of the deed presents any serious difficulty.

All the Judges of the Second Division were of opinion that there

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was here a perfectly *habile* exposition by *William Dunn* of the true meaning and import of his deed, and that there was no obstacle in form or substance to giving effect to it. One of them, Lord *Benholme*, thought that the word "heirs" should be read as heirs of the body, but said he did not consider that necessary for the decision of the case, plainly indicating his concurrence in the view taken by all the other Judges as being sufficient for the decision of the case. Other Judges hesitated, or declined to hold that the word "heirs" was to be construed as "heirs of the body" with reference to every combination of circumstances that might have occurred, although in the case that did occur the result, or at least the primary result, was practically the same. The Lord Justice Clerk in particular thought that the words "heirs and assigns whomsoever" had such a fixed meaning that he could not simply read them as "heirs of the body," but he did not doubt that the testator could qualify the earlier part of the dispositive clause so expressed by a subsequent part, or that such qualification should receive effect, giving as it did in apt language full and clear expression to the testator's purpose as to the destination of his heritable estates.

While I concur with the Lord Justice Clerk in holding as a general proposition that the words "heirs and assigns whomsoever" have a known meaning which is not the same as heirs of the body, and which is so far a fixed meaning that it cannot easily be wrested from them, I am not disposed to go the length of holding that these words may not admit of construction. But I concur with him, and all the Judges of the Second Division, in thinking that it was competent for the grantor of the deed, after having used these words, still to attach conditions as to the succession of the heirs whomsoever, or to qualify and explain his disposition and settlement by subsequent words and provisions, and that he has effectually done so.

I therefore think that the judgment of the Court below in this case is substantially right; but there is a point in the case which appears not to have been adverted to when the case was under the consideration of the Court, and with reference to which it may be necessary that some alteration should be made as regards the terms of the judgment—I mean with regard to the point as to the *dominium utile* of *Boquhanran*. I think, with reference to that, the

judgment of the Court ought to be altered or explained in the way proposed by my noble and learned friend on the woolsack.

Then as to the second appeal, the question raised by Mr. *Dunn Pattison* in that appeal presented to my mind much more difficulty than the one which was raised in the appeal on which I have expressed my opinion. I think that was a very difficult question, and one as to which there is little, if any, precedent; but I think there are principles that go to settle it. There is, in some degree, a conflict of principles in the circumstances that occurred. The general rule is, that when a consolidation of the *dominium utile* and the *dominium directum* takes place, the *dominium utile* is merged or swallowed up in the *dominium directum*, and that the whole will go in the same direction; that is, in the direction of the *dominium directum*. That is certainly the general principle; and if in this case *Alexander Dunn* had held the *dominium directum* destined to himself and one series of heirs, and had held the *dominium utile* destined to himself and another series of heirs, without there being any other controlling interest in the matter, it might have been held, and probably would have been held, that by consolidating them he sent the *dominium utile* in the direction in which the *dominium directum* was to go. But then there is another principle, another power, which comes into operation in this case, and that is founded upon the circumstance that there was a controlling personal destination as to the *dominium directum*, a controlling personal right, and so long as *Alexander Dunn* merely made up his titles by entry, that personal title controlled it.

Now, then, the *dominium utile* being hooked on, as it were, to the *dominium directum*, the question arises, how is the right which Mr. *Dunn Pattison* had under *William Dunn's* deed, which was a controlling right, to be rendered effectual? Upon that the first question is, what was his right under *William Dunn's* deed? His right under *William Dunn's* deed was to have the *dominium directum*, but it gave him no right to get the *dominium utile*. Then, what right has he to the *dominium utile?* His only right to the *dominium utile* must be this, that he claims that *Alexander Dunn* gave it to him by consolidating it with the *dominium directum;* that *Alexander* enriched, as it were, the *dominium directum* for his benefit. That is said to be apparent from the words of resignation,

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which import a resignation *ad remanentiam*—that the two were to remain united together. Those are words of style; but still the question remains whether we are to hold that Mr. *Dunn Pattison* is, through and by virtue of the rights he had, entitled, under that personal title which *William Dunn* gave him, to demand from the heir more than was given to him by *William Dunn*, and whether we are to hold that it was the intention of *Alexander Dunn* so to enrich the *dominium directum*. I cannot hold that to be so. I think, upon the whole, that the prevailing rule ought to be that the heir of the *dominium directum*, the heir of provision, was not the heir *Alexander Dunn* had in his mind when he resigned the *dominium utile* into his own hands to remain with him and his heirs. And if that be so, if we are to hold that that was not the purpose of *Alexander Dunn* (and I think there are various circumstances which indicate that it was not his purpose), I do not think we can apply the rigid rule, which might exist in other circumstances, of the *dominium directum* swallowing up the *dominium utile*, to a case where it is only upon a limited personal title as the heir of provision that Mr. *Dunn Pattison* comes in claiming that which *William Dunn* gave him. It was in the power of *Alexander Dunn* during his life to have separated these interests; it was in his power to have left them to his heir-at-law, or to any other of his grand-nephews or nieces; and it is impossible to say that he intended them to go to Mr. *Dunn Pattison* rather than that he intended to deal with them in a way which would not have sent them to Mr. *Dunn Pattison*.

I therefore think that the Court have arrived at a sound conclusion upon this difficult question, and that their judgment should be affirmed.

*Judgment affirmed, with the variation proposed by the Lord Chancellor.*

Solicitors for the Appellant *Barstow*: *Martin & Leslie.*

Solicitors for the Appellant *Pattison*: *Connell & Hope.*

Solicitors for the Respondents and Cross Appellants: *Loch & McLaurin* and *Simson & Wakeford.*

THE LORD ADVOCATE . . . . . APPELLANT; 1869
STEVENSON . . . . . RESPONDENT. *Feb.* 25.

*Succession Duty—Heir Apparent—Beneficial Interest under the* 16 & 17 *Vict. c.* 51.

Where an apparent heir died without taking possession,—without making up a title—without drawing rent—and without incurring representation:—

*Held*, that the case did not come within the meaning of the statute, and that succession duty was not demandable by the Crown.

*Per* THE LORD CHANCELLOR:—The "beneficial interest" must be regarded as an interest to which the successor *has become entitled in possession.*

*Per* LORD WESTBURY:—It must not be a mere apparency.

THIS case originated in an information presented by the Lord Advocate, on behalf of the Crown, for the recovery of succession duty from the Respondent. The facts were shortly these:—

Miss *Janet Finlay*, owner of a freehold house in *Edinburgh*, died intestate on the 5th of June, 1862; leaving Miss *Williamina Finlay*—a younger and only sister—her surviving heiress-at-law.

Four months afterwards, on the 22nd of September, 1862, Miss *Williamina* herself died, having made her last will and settlement, which, however, as a conveyance of the house in question, was ineffectual and inoperative, the instrument having been executed on her death-bed.

Under these circumstances the Respondent claimed the house as nearest heir of Miss *Janet*; passing over Miss *Williamina*, who had neither derived any benefit from the property, nor made up any title to it, nor had she done anything to incur representation.

In December, 1862, the Respondent completed his title to the house by a writ of *clare constat* duly registered; and, having then taken possession, he subsequently, at Whit Sunday, 1863, received the rent of the preceding half-year, that is to say, the rent from the 11th of November, 1862, to the 15th of May, 1863, the prior rents having belonged exclusively to the executors of *Janet Finlay*; so that *Williamina* could not have come into possession or derived any benefit from the succession, she having died nearly two months before her right could have become available.

When a year had expired from Whit Sunday, 1863, the Re-

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spondent paid to the Inland Revenue Office, at *Edinburgh*, the two first half-yearly instalments of duty exigible from him as successor (not of Miss *Williamina*, but) of Miss *Janet Finlay*. The Board of Revenue, however, insisted that Mr. *Stevenson* took the house as the successor of Miss *Williamina*, who herself had succeeded Miss *Janet*, thus making out that (not one, but) two successions were to be accounted for.

The Court of Session, confirming the interlocutor of the Lord Ordinary (1), gave judgment against the Lord Advocate and in favour of the Respondent—the presiding Judge (2), however, remarking, that "the question was new and difficult."

The Lord Advocate, on behalf of the Crown, appealed to the House.

The *Lord Advocate* (3), and Mr. *Stair Agnew*, appeared as Counsel for the Appellant.

Mr. *Anderson*, Q.C., and Mr. *Shiress Will*, for the Respondent.

At the close of the argument for the Appellant, the following opinions were delivered by the Law Peers:—

THE LORD CHANCELLOR (4):—

My Lords, the Respondent in this case, Mr. *Stevenson*, made up his title as heir to *Janet Finley*; and as such he became liable, undoubtedly, to succession duty in respect of his succession to her; but the question is, whether he also became subject to duty as successor to *Williamina*, under either the 2nd, or 21st, or, I may add, the 20th section of the 16 & 17 Vict. c. 51.

The Act distinctly provides in the 2nd section:

> That every devolution by law of any beneficial interest in property, or the income thereof upon the death of any person, to any other person in possession or expectancy, shall be deemed to have conferred a succession.

But, my Lords, in the 21st section the Act more clearly expounds what is meant by a beneficial interest actually devolving on a successor, by declaring that

(1) Lord *Ormidale*.
(2) The Lord Justice Clerk *Inglis*.
(3) Mr. *Moncreiff*.
(4) Lord *Hatherley*.

The interest of every successor (except as herein provided) in real property shall be considered to be of the value of an annuity equal to the annual value of such property, after making such allowances as are hereinafter directed, and payable from the date of his becoming entitled thereto in possession, or to the receipt of the income or profits thereof during the residue of his life.

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The statute further directs that the instalments shall be payable at the end of the year after the successor becomes entitled in possession (1).

Having regard, therefore, to these two sections, it appears to me that we must construe the Act as enacting that the "beneficial interest" mentioned in the 2nd section must be regarded as a beneficial interest to which the successor has become entitled in possession. And we have to ask ourselves whether or not *Williamina* was a successor of that description? It appears to me, my Lords, that it cannot be predicated of her that she was a successor having a beneficial interest in possession in this property.

There are certain acts which an heir who has not made up his title may perform; and which, in a certain sense, may be considered (as the Lord Advocate has strongly argued) as entitling us to consider *Williamina* in this case as having had a beneficial interest. But such acts as have been referred to do not seem to me to render it such a beneficial interest in possession as we have to look to under the *Succession Duty Act*. In what way can we say that *Williamina* had any such interest under the circumstances that have occurred? She had a year (2) in which to deliberate whether she should or should not make up her title—in other words, to deliberate whether or not she would desire to become the owner of the property and so become entitled to its possession. During that year she died; and nothing having been done by her, the property of *Janet* was a *hæreditas jacens*. That being so, and she having died without any intimation of intention one way or another, the Respondent, Mr. *Stevenson*, became, upon making up his title, the successor of *Janet*, and therefore the successor to the *hæreditas jacens*, and was entitled to it as claiming under *Janet*. If we were to hold otherwise, the difficulty and also the hardship would be very great in a case of this description, because in assessing the

(1) The 20th section, before referred to by the Lord Chancellor, says, "The duty shall be paid when the successor shall become entitled *in possession*."

(2) See note, *infra*, p. 415.

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duty on *Williamina* she would become personally liable in respect to the duty due to the Crown, yet at the same time she would have the right, within a year, of renouncing the succession. And on one of your Lordships asking the counsel who have argued this case in what manner she could free herself, if made liable to the duty, from having personally to pay that duty, or from having it made a charge on her estate in the hands of her executors, no answer was given to the question. It was admitted that there was no mode in which she could be freed from the consequences of becoming a successor in the sense of being liable to duty under the Act. Surely that would be a very unfit construction to put upon the Act unless the words of the statute are so peremptory as to impose upon us the duty of so construing it. It appears to me, I confess, that there is nothing in the Act which leads to such a conclusion, but that there is everything in it to lead us to the contrary construction.

The Lord Advocate contended that if we were to hold that the duty is not payable under the circumstances of this case, we should be obliged to extend that construction to the case of an heir remaining for several years without making up his title. The answer is, that the heir must during that period have done some act which would manifestly confer upon him a beneficial interest in possession. The case, therefore, which was suggested in argument, of a person beneficially entitled in possession remaining for several years without making up his title, has no application to the singular case which the House has now before it, of a person dying within the time during which the heir has the choice of accepting or rejecting the succession without having done any act to express the determination to which she intended finally to come.

Under these circumstances, it appears to me that your Lordships ought to affirm the interlocutors complained of, and dismiss the appeal with costs.

LORD CHELMSFORD:—

My Lords, I entirely agree with my noble and learned friend on the woolsack.

It appears to me that *Williamina* never did become entitled to the beneficial enjoyment of this property. It is a very peculiar

case; it is one not at all likely to occur again. But, under its peculiar circumstances, I entirely agree with the decision of the Court of Session that *Williamina* was not liable to the payment of any duty, and that, consequently, the Respondent is not liable to the payment of succession duty in respect of her succession.

Mr. *Anderson*:—Will your Lordships allow me to mention that the *annus deliberandi* is now abolished (1), and that it is now only six months instead of a year that is allowed. I think it is only right that that fact should be noticed before your Lordships proceed further.

The *Lord Advocate*:—It does not make any difference.

LORD WESTBURY:—It is a mere substitution of six months for twelve months. The principle of the law remains the same.

The *Lord Advocate*:—Exactly, my Lord.

LORD WESTBURY:—

The *Succession Duty Act* attaches upon interests in possession and interests in expectancy; but the duty payable on the value of an interest in expectancy is not payable until that interest becomes an interest in possession, with this exception, that if the interest in expectancy be in the successor a continuing interest, and capable of being transmitted by will (which definition is used for the purpose of denoting interests of which the successor in expectancy has the absolute ownership), then such continuing interest becomes in reality a new succession, and makes the duty attaching upon the interest in expectancy a debt of the successor who has that continuing interest.

The question here is, whether *Williamina* had a continuing interest capable of being transmitted by her as her absolute property? The facts are—that she held upon an apparency; that the beneficial interest would not arise until the expiration of six months after the death of her sister *Janet;* that she died before

(1) Under the 21 & 22 Vict. (1858) c 76, proceedings may now be instituted against apparent heirs in *Scotland* at any time after the lapse of six months from the commencement of the apparency.

Ante 413.

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THE LORD ADVOCATE v. STEVENSON.

those six months had expired; and that she did nothing either to incur representation or to make up a title to the estate. I think it is clear, therefore, that she had no continuing interest, either in the sense of those words in the Scotch law, or within the meaning to be attached to those words under the *Succession Duty Act*.

Well, now, had she a beneficial interest in possession? If you look at the 21st section, and take the words about the time when the duty shall arise and become payable, for the purpose of applying them by way of test or criterion as to what is the meaning of the words "beneficial interest" in the section, you must come to the conclusion that what is meant is a beneficial interest in actual enjoyment and possession. If that be so, it is clear that the apparency of *Williamina* never came within that category, and never was an interest of a nature to which the words "beneficial interest in possession" can be properly applied.

Upon those grounds, my Lords, which I believe are the grounds which were taken by the Court below (1), I entirely concur with my noble and learned friend on the woolsack in advising your Lordships to affirm these interlocutors. Undoubtedly we felt some anxiety at first, because the learned Lord Advocate stated that this case would probably be an authority for many others. I can hardly imagine that that will be so, because the present case depends upon the combination of a set of circumstances which are very singular and very peculiar, namely, an apparency which determined within the six months during which the right to the enjoyment of the deceased sister's property extended, without anything having been done to constitute an act of ownership on the part of the apparent heir. This is a case which cannot often occur. It is governed by its own peculiar circumstances, and it will add nothing to the law as it has been already ascertained.

LORD COLONSAY and LORD CAIRNS concurred.

*Interlocutors complained of affirmed, and appeal dismissed with costs.*

Solicitor for the Appellant: *W. H. Melvill.*
Solicitors for the Respondent: *Holmes & Co.*

(1) 3rd Series, vol. i. p. 322; and 38 Scottish Jurist, 165.

CLEPHANE *et al.* . . . . . APPELLANTS;
THE LORD PROVOST, &c., OF EDINBURGH . . . . . RESPONDENTS.

1869
Feb. 26.

*Charity Trust—Distinction between the Object and the Mode.*

In *Scotland*, as in *England*, there is an enlarged administration of charitable trusts distinguishing between the charity itself and the mode prescribed for its accomplishment. One charity will not be substituted for another charity; nor will a charity intended for one purpose be applied to a purpose altogether different; but in the progress of society a change of mode may become desirable, and the Courts have sanctioned such change of mode to secure more effectually the benefits intended.

*Appeal from an Exercise of Discretion.*

Where the House has directed that a scheme shall be framed for the administration of a charity, leaving it open to the exercise of discretion whether a certain specified operation shall, or shall not, be performed; and where in the exercise of the discretion so devolved it is determined that the specified operation is unnecessary and inexpedient—the decision is final, and the House itself is precluded from reviewing it.

AT a former stage of this litigation (1) the House directed that a sum, not exceeding £7000, should be expended in purchasing a site and building a church in lieu of the original fabric; which, along with the hospital itself, had been taken and destroyed by the *North British Railway Company;* who, however, compensated the charity by paying the trustees, in May, 1848, a large sum of money, represented as "amounting altogether to £17,671 9*s.* 6*d.*" (2)

The judgment of the House ordering a new church, did not order that a new hospital should be built. The question as to building a new hospital was left open—to be determined by an exercise of discretion—having regard to all the circumstances of the case when a scheme should be prepared and settled for the future administration of the charity. With a declaration to this effect, the cause was remitted back to the Court below to do therein as should be just and consistent with the judgment of the House.

On the case returning to the Court of Session it appeared that

(1) 4 Macq. 603. (2) Ibid. p. 612.

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the system of out-door relief had proved satisfactory. Their Lordships of the First Division, therefore, decided that "*it was not necessary or expedient to rebuild the hospital.*" Hence this appeal to the House by certain bedesfolk, or pensioners, on the foundation, suing as paupers.

Mr. *Anderson*, Q.C., and Mr. *Wotherspoon*, were heard for the Appellants.

Sir *Roundell Palmer*, Q.C., and Mr. *Mellish*, Q.C., were not called upon.

The following opinions were delivered by the Law Peers:—

THE LORD CHANCELLOR (1):—

This unfortunate charity (for so I must denominate it) received £17,100 nearly twenty-one years ago, in consequence of the purchase of part of its property by a railway company; and now in this fifth year since the judgment of your Lordships was pronounced, we are again called upon to decide in a conflict which a little good humour, joined to the great intelligence which I have no doubt is possessed by the parties, might easily have prevented.

The judgment of the House, after directing that a sum not exceeding £7000 should be appropriated to the erection of a church for the benefit of those who were receiving the advantages of the charity, and also of those who, for many years previous to this litigation, had had the use of the church as residents in *Edinburgh*, proceeded to declare:—

> That all the residue of the money received from the said railway company, and all interest thereon, and all the rest of the property of the said hospital, was applicable to the enlargement and maintenance of the charity, according to a scheme to be settled for that purpose, including therein the rebuilding of the hospital *if the same should be deemed necessary.*

It was remitted to those who had to consider the case, when brought before them by the submission of a scheme, to decide whether or not they deemed the erection of a hospital necessary. If so, the whole of the learned argument to which we have this day listened is addressed to us for the purpose of asking us to do that

(1) Lord *Hatherley.*

which is impossible, namely, to reverse the previous decision of this House.

Authorities have been cited to prove that the Court has no power to alter the provisions alleged to have been made by the original charter until the hospital itself is first erected as a substantive building. The whole case seems to turn upon that single point. But what, after all, is the true object, purport, and intent of this charter? It contains the following recital:—

> Know ye, Us, and our dearest Cousin *James*, Earl of *Murray*, Regent of our Kingdom, moved by fervent and zealous purpose to support and assist the poverty, penury, and want of many and diverse aged and impotent persons, who, in their old age, have lost their means and estates by and through the events of adverse fortune, so that they may not perish and die through extreme hunger, penury, and want of necessary sustenance; and therefore moved by piety and good conscience to afford them such help and assistance as their want and need require; as also understanding that this purpose cannot be properly carried into effect without our supplement and authority.

These words indicate the motive on the part of the Crown, which is simply to relieve the poverty, penury, and want of the sufferers described.

The real object of the charter was not what is ordinarily found in foundations of hospitals as such. It was not a scheme by which anything in the shape of a permanent building, and staff thereto attached, for the purposes here described, is suggested. Nothing of that kind appears in the grant. There is no provision for a governor, or a master, or matron, or nurses, or chaplain.

This was not a charity for which it was essential that a building should be provided which should be always attached to the charity, or one with regard to which any provision was made for continuing it in the shape of a hospital to be governed by rules, ordinances, and regulations, such as you find in the constitution of ordinary hospitals founded for the special purposes of their being continued in perpetuity under the terms of the grant.

Since the year 1846 or 1847, when the hospital was taken down, the sick, the aged, and the poor have been administered to exclusively by out-door relief.

But say the Appellants, if it be not necessary to erect the hospital why erect the church? There, again, we are undoubtedly precluded by the order of the House pronounced on the former

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occasion. But even if we were not so precluded, I do not at all admit the justice of the Appellants' argument. Many of those persons who are relieved by means of this charity may be residing in the neighbourhood; and the probability is that many of them would have their residence near this church. Many of them, therefore, would be partakers of the benefit which the Order of this House was intended to secure to them.

The Appellants sue as paupers, and of course they will pay no costs. But it appears to me that, with your Lordships' sanction, no costs ought to be allowed. Therefore, what I should propose to your Lordships would be—to affirm the decree appealed from, to grant no costs to the Appellants, and to direct that the costs of the Respondents should be paid out of the charity estate.

LORD CHELMSFORD:—

The judgment of the House upon the former occasion was perfectly correct. It was justified by the conditions of the charters, and it is in itself conclusive of this question. I therefore entirely agree with my noble and learned friend upon the woolsack that this interlocutor must be affirmed. I also agree with him upon the subject of costs.

LORD WESTBURY:—

I should hardly feel it necessary to add a word to what has been addressed to your Lordships, but for some observations which fell from the Appellants' counsel, and which seemed to shew that this subject of the administration of charitable trusts is not yet perfectly apprehended.

The jurisdiction of the Court of Session in *Scotland*, and the jurisdiction of a Court of Equity in *England*, upon the subject of the administration of charitable trusts, are one and the same. Undoubtedly in *England* we have had a greater number of cases, and therefore the principles have been more fully developed. The rules which have been laid down, and the authorities in *England*, are of course not binding upon the Court of Session. Yet, as they are illustrations of the same principles of law, I dare say that wherever an opportunity arises the Court of Session will deem them entitled to great respect and attention.

Now in both countries this principle has prevailed, namely, that there shall be a very enlarged administration of charitable trusts. You look to the charity which is intended to be created; and you distinguish between it and the means which are directed for its accomplishment. Now the means necessarily vary from age to age. Take a charity such as the present, for the relief of the poor. The condition of the country or of the locality may have dictated what were at the time very convenient means for its proper application. In the progress of society, however, with the greater diffusion of wealth, and the growth of population, the means originally devised may become inadequate to the end, and Courts of Equity have always exercised the power of varying the means of carrying out the charity from time to time, so as to secure more effectually the benefits intended.

It is true you cannot substitute one charity for another. You may substitute for a particular charity which has been defined and which has failed, another charity *ejusdem generis*, or which approaches it in its nature and character; but you cannot take a charity which was intended for one purpose and apply it to a purpose altogether different. Some instances occur in our English reports upon the subject, but on examination it will be found that what was done in those cases was not done under the ordinary authority of the Court of Equity, but was done in cases where the charity had failed by reason of illegality, and where it consequently devolved upon the Crown to declare what should be the form of administration to be adopted. I mention this, because our attention has been directed to the language which was used by Lord *Eldon* in *The Attorney-General* v. *Mansfield* (1). That language was never intended to disturb the settled doctrine that the means for the attainment of the end may be altered from time to time. Neither was that language intended to interfere with the settled doctrine called *cy-près*, as understood in Courts of Equity. It was meant to apply only to cases where, for example, an attempt was made to lay out money given for the relief of the poor towards the building of a bridge, the making of a road, or the draining a town—objects quite *diversi generis* from those intended by the donor.

(1) 2 Russ. 501.

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In the direction here given for the establishment of a hospital there is nothing more, so far as the charters go, than, as it were, the erection of an ordinary poorhouse where the poor and the sick may be received, and lodged, and maintained so long as may be necessary; and the whole seems to be left entirely to the discretion of the superintending authority by the founder of the charity.

Now these buildings, such as they were, have been swept away, under the authority of the law, by a railway company—and there is substituted for them a large sum of money. Where is the necessity that that money, constituting the property of the charity, should not be dedicated to the use and service of the poor in the same manner as that in which, at the time of the foundation of the charity, it was considered that the end of relieving the poor might be best accomplished? If the end of relieving the poor can be better accomplished now by hiring dwellings for them, or by enabling them to get lodgings or cottages of their own, the substantial object will be accomplished, and if we allow the laying out of £10,000 in the erection of a building for the reception of the poor, the interest of that money will be so much money taken away from the number of pensions which might otherwise have been given in out-door relief.

But it does not follow that because we approve of out-door relief to-day, it should have perpetual duration. Another set of circumstances may arise ten, twenty, or fifty years hence, which will suggest a different and a more beneficial form of administration. Whether there should be another building or not was left to the wise discretion of those who were armed with the power of administering this charity, and it was accordingly settled deliberately by this House, that if they deemed a hospital necessary a new hospital should be built; but that if they deemed a new hospital unnecessary for the benefit of the poor, then there was no obligation to erect such a building.

We have here an administration which has been exclusively directed to out-door relief for the last twenty-one years, and an administration which has consisted, as to the greater portion of the funds, in out-door relief since 1785. What is there to justify our departing from all that has been done, altering the course which we find to have existed, and directing so much of the funds of this

charity to be laid out in what would probably be found to be a wasteful and useless expenditure?

If these things had been considered, as I think they ought to have been considered, below, I think we should not have observed the strange spectacle of an appeal brought here in the hopeless attempt to alter the Order of the House, and I think that we might have been spared observations which were directed to shew that the Order of the House was inconsistent with law and with justice. I have dwelt so much upon this point, not because I felt that the judgments of your Lordships' House required to be vindicated, but only to repeat the considerations which were present to the minds of my noble and learned friends, who, with me, heard the former appeal, and to my own mind, when this Order was drawn up.

I entirely concur with my noble and learned friend on the woolsack as to the costs; but, my Lords, I do hope and trust that this is the last that we shall hear of this case, and I rejoice the more because we can with perfect justice refuse to the Appellants their costs, as such refusal will be one of the most effective and salutary modes of preventing further litigation. Let the lesson be remembered; because, without it, I feel certain that if hereafter there were a peg upon which an appeal could be hung we should have that appeal brought here.

LORD COLONSAY:—

My Lords, as to the question whether or not another building should be erected as a hospital, the matters for consideration in the Court below appear to have been, first, whether they rightly understood the judgment of your Lordships as having dealt with that question; and, secondly, whether if they rightly understood it as having dealt with that question, and having left it to the discretion of those who had the management of the charity, there has been anything advanced to shew that that discretion has been ill used. Now, upon both these points, I think that the case is clear. I think it very clear from reading the judgments of this House in 1864 that the House did deal, and did intend to deal, with the question whether or not a hospital building should be erected, and that the House dealt with it by leaving it to the discretion of those who had the management of the charity to

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determine whether it was expedient or necessary that such a building should be erected. Those parties having come to the conclusion that it was not necessary, and that it was not expedient to erect a hospital, but that it was more expedient and more fitting that the relief should be given to the objects of it out of doors, and nothing having been urged here as matter of discretion against that decision, I think that we have no course now but to affirm the judgment of the Court below in that matter. If it had been open to us now to go into the question whether the charters which have been read made it absolutely necessary that a hospital should be erected, and precluded all discretion under all circumstances, we might have had a different course of proceeding to follow out. But, as far as I have been able to judge from the argument which has been submitted to us, I see no reason to doubt that the judgment of this House in 1864 was perfectly in accordance with the principle and the tenor of these charters.

But there is another point in this case—as to the sum which was intended to be applied to the building of a church. I have no doubt now, after hearing what your Lordships who took part in the proceeding in 1864 have said, that the Court below have misread or misunderstood the judgment of the House upon that matter; and, therefore, the alteration which has been suggested in the judgment of the Court below must be made, and the amount of money to be applied to the erection of a church must be limited to the sum of £7000. I hope, however, that with regard to that matter there will be no further delay in carrying out the directions of the House and of the Court below. As long as that matter is delayed, that sum, whatever it may be, which ought long ago to have been applied to the erection of a church, is lying accumulating for the benefit, as it is said, of the charity, but to the detriment of those who are to have the benefit of the church. I hope, therefore, that no further impediment will be interposed to the application of that fund to the purpose to which it has been directed to be applied.

As to the notion that if there is to be no building of a hospital there is to be no church, I think that I must regard that as more ingenious than sound. I cannot go along with the notion that no parties are to have benefit from the church accommodation except

the parties who reside within the building of the hospital, and those parties residing in the neighbourhood of the church. I think that under the interpretation which has been put upon the charters the recipients of this charity are the parties who are primarily entitled to the benefit of accommodation in that church, and that when the judgment of the Court below used the expression "beneficiaries" it used it properly, seeing that in the view which that Court took, and in the view which this House has taken, there were to be no inmates. It did not follow from that, that the beneficiaries of the charity are to be deprived of church accommodation. They are entitled to have it, and then further accommodation is to be given to the parties residing in the neighbourhood.

As to the matter of costs I entirely concur in what has been suggested by my noble and learned friends.

THE LORD CHANCELLOR put the questions as follows:—

That the interlocutor complained of be affirmed; that the Appellants neither receive nor pay costs; and that the costs of the Respondents be retained by them out of the charity estate.

Resolved in the affirmative (1).

Solicitors for the Appellants: *Simson & Wakeford.*
Solicitor for the Respondents: *John Graham.*

(1) The judgment further directed, with reference to the £7000 for building the church, that there should be added the words "if so much be required."

1869
Mar. 18.

THE REV. DR. LEE, *et al.*, DEANS OF THE CHAPEL ROYAL, AND THE LORD ADVOCATE . . . . . } APPELLANTS;

JOHNSTONE OF ALVA, *et al.* . . . . . RESPONDENTS.

1 Jur. (N.S.) 581

*Ancient Decree—Presumption in its Favour.*

A decree, to all appearance just in itself when pronounced, and strengthened, moreover, by constant possession and unvarying recognition for more than two centuries:—

*Held*, to require the strongest grounds to warrant its impeachment,—the great principle applicable to such a case being *Omnia præsumuntur a judice rite et solennitur acta.*

This principle was deemed peculiarly imperative in a case where the decree in question, with its warrant and register, was shewn to have perished in a great fire so far back as 1700—nothing remaining but an extract.

*Presumption in favour of long Possession.*

*Per* LORD WESTBURY:—We ought to presume everything that can be reasonably supposed in favour of long possession. I do not find that doctrine quite so prominent as I could have desired in the judgments below.

*Titular and Tacksman of Teinds.*

By the law of *Scotland* a person may be, at *once*, both tacksman and titular of the same teinds.

THE action out of which this appeal arose was brought by the Appellants to reduce a decree of valuation dated the 28th of July, 1647, whereby the teinds or tithes of certain lands in the parish of *St. Marykirk*, in the county of *Selkirk*, were fixed at £210 Scots per annum.

The main ground of reduction was, that the decree sought to be set aside had been pronounced in the absence of the titular, and without citing or giving him notice; the only intervening parties having been, as the Appellant averred, the heritor and the tacksman. This was the allegation on which the Appellants mainly relied.

One answer made by the Respondents was, that the tacksman of these teinds in 1647 was the then Earl of *Buccleuch*, who was not only the tacksman of them, but the titular also. They further insisted that such a decree would be binding on the titular "if the

tacksman or other person in actual possession of the teinds" was a party to the valuation.

The Respondents further maintained that the decree was now fortified by prescription, by homologation, and by an acquiescence of more than two centuries.

It appeared that in 1700 the records of the Teind Court were destroyed by a great fire; and among other documents which perished were the pleadings, the register, and the decree in this case of the *Marykirk* teinds—the only original judicial document remaining being an extract from the decree, which, though authentic, was imperfect.

The Court below (acting as Commissioners of Teinds), on the 20th of February, 1867 (1), assoilzied the Defenders (the above Respondents) from the conclusions of the action with expenses; and hence this appeal.

The *Lord Advocate* (2), and Mr. *Henry J. Moncreiff*, appeared for the Appellants.

Sir *Roundell Palmer*, Q.C., and Mr. *Nevay*, for the Respondents.

The following opinions were delivered by the Law Peers:—

THE LORD CHANCELLOR (3):—

The main questions (which have been most ably discussed before us (4)) are as to the true construction of this decree, and whether or not the titular must be taken to have been summoned and to have appeared.

I will, in the first place, consider the effect of the decree itself *ex facie*, and how, under ordinary circumstances, it ought to be construed;—regard being had to the terms of the extract, which, though not complete, contains, as it appears to me, all that is material for arriving at a just conclusion as to the scope and object of the decree.

The decree appears to have been pronounced by certain Com-

(1) 3rd Series, vol. v., p. 414; and Scottish Jurist, vol. xxxix. p. 220.
(2) Mr. *Moncreiff*.
(3) Lord *Hatherley*.
(4) The argument of Mr. *Henry J. Moncreiff* was especially lauded both by the Peers and by Sir *Roundell Palmer*.

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missioners appointed in the time of *Charles* I., for the purpose of effectuating a valuation of teinds throughout *Scotland*, in order that proceedings might be taken subsequently for the purchase of those teinds, and for settlements to be made with the heritors in respect of them. There were Sub-Commissioners also appointed for the various districts. But every proceeding of the Sub-Commissioners had to be laid before the Commissioners themselves, was subject to review by them, and required, or might receive, their approbation.

In the present case we find that the decree itself purports to be in the matter of a "Summons raised at the instance of *William Elliot* of *Stobs*, heritor of the lands underwritten, against *Francis* Earl of *Buccleuch*, and Mr. *William Elliot*, minister of *St. Marykirk*, for his interest."

It was necessary that there should have been summoned, or actually attending, three parties, namely, the heritor, in respect of his interest in the lands; the minister, in respect of his interest in the teinds, stipendiary or otherwise; and the titular, in whom was vested the ownership of the teinds. Now we have the summons mentioned in the first part of the decree, as bringing before the Commissioners the Earl of *Buccleuch*, Mr. *William Elliot*, the minister, and Mr. *William Elliot* of *Stobs*, the heritor. In what character the Earl of *Buccleuch* intervened appears more manifestly as we read the terms of the decree itself, which recites that—

> The teinds, parsonage, and vicarage within the parish of *St. Marykirk* are not yet valued, nor the true worth and avail thereof dignosied [which, I suppose, means ascertained], wherefore the Pursuer [that is, Mr. *Elliot* of *Stobs*, the heritor] is content that ane lawfull and formall valuation be made thereof be the said Commissioners; and for that effect is willing and ready to adduce ane lawfull probation of the worth of the said lands in stock and teinds, parsonage, and vicarage; and in the mean time necessary it is that the said Pursuer have warrand granted to him to lead the teinds of his said lands this instant crop and year of God 1647 years, finding caution for payment.

The decree then proceeds to state that the procurator of the Pursuer produced an agreement between the Earl of *Buccleuch* and the Pursuer, and subscribed by them;—whereby

> They agreed upon the constant worth of the teinds of the lands underwritten, and desired the said Commissioners to ratify and approve the same. And the

same Earl of *Buccleuch*, appearing by his procurator, and consenting thereto, and the said Mr. *William Elliot*, minister, being oftentimes called and not appearing, the Commissioners having heard, and seen, and considered the agreement produced, and therewith being well advised, they have ratified, allowed, and approved of the same.

Then the agreement itself is set out, dated the 26th of July, 1647;—whereby

It is agreed between the Earl of *Buccleuch* on the one part, and *William Elliot* of *Stobs*, on the other part, that the teinds in question shall be in all time coming two hundred and ten pounds Scots, with a certain deduction of His Majesty's case, whereunto the said Earl of *Buccleuch*, as tacksman and titular, and the said *William Elliot* of *Stobs*, as heritor of the said lands, have agreed by thir presents.

Now, having carefully perused the several and somewhat varying opinions of the learned Judges in *Scotland*, it appears to me impossible to construe this instrument as bearing *ex facie* any other meaning than this:—That it is an arrangement come to between the heritor and the Earl of *Buccleuch* for what is called a constant or fixed valuation of the teinds for all time coming; that is to say, a fixed valuation to have perpetual effect, and not to be limited in any way in its extent as far as the words go, unless we find something else on the face of the document which would induce the Court to say that a limitation ought to be placed upon these otherwise clear and unqualified words.

The learned Judges below (Lord *Deas* particularly) (1) have pointed out that there is a marked distinction in the frame of this decree as compared with other decrees which did affect to limit the period for which the valuation should be made, where a limited interest occurred, as in the case of a "tack," which would endure only during the tacksman's interest. Where such a limitation has been intended, the intention has been expressed, and certain regulations have been made with reference to payment of interest on the valuation for a limited period. The *primâ facie* view of any decree of this description would appear to be this:—That the object of the valuation was to obtain an entire and complete valuation upon which sales could be made; though in certain cases such valuation, for some reason or other, could not be effected. And in such cases exception was made, and, exception being made, it was

(1) 3rd Series, vol. v. p. 462.

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expressed on the face of the instrument—namely, that only a limited and not a complete interest for all time coming was that which was within the purview of the Commissioners in making the decree. I think in only one instance has anything apparently to the contrary been pointed out. I mean in the case of *Easter Glens*, upon which I must say a word or two presently.

The next point is,—upon the face of the decree, who appear to have been the parties to it? There can be no doubt about this. We have not the summons, and are not able, therefore, to say precisely who were summoned beyond those who appear on the face of the instrument—but we do find undoubtedly upon the face of the instrument an agreement set out as between the parties who were brought before the Commissioners, those parties being Mr. *Elliot* of *Stobs* and the Earl of *Buccleuch;* and we have to look to the agreement, which the Commissioners affirm, to see in what character the parties who asked them to affirm the agreement appeared before them. Those who appeared before them produced an agreement; and they must be taken to have come before the Commissioners in the character in which they describe themselves in that agreement. Mr. *Elliot* describes himself as heritor, and the Earl of *Buccleuch* is described as being "tacksman and titular," and as having right to the teinds of the parish. There is no controversy, therefore, whatsoever that, rightly or wrongly, on the face of the instrument he describes himself as being both tacksman and titular, and as having a right to the teinds of the parish. And we are asked to do one of two things—either to say that it was an erroneous assumption on the part of the Earl to claim the right of titular, when he was only tacksman; or, what is said to be a much more reasonable proposition, to assume that this description of the Earl in the agreement means no more than that he was tacksman, and *quà* tacksman was also titular.

This observation, however, arises at once upon such an argument, namely, that a double description seems utterly superfluous, if the single description was effectual. The description of the Earl as tacksman would be perfectly sufficient if the Appellants were well warranted in their construction that this was intended to be a valuation only during the duration of the tack. In that case the introduction of the two terms, "tacksman" and "titular,"

could have no effect but to introduce confusion into the agreement.

But there is another reason for holding that the Earl of *Buccleuch* intended to describe himself as titular. It was absolutely necessary that the titular should be present. This proposition has scarcely been controverted by the Appellants. A suggestion was indeed made, which prevailed to a certain extent in the minds of some of the Judges in the Court below, especially Lord *Curriehill*, that although it might be necessary, or, at all events, proper and expedient, to have the titular present at the time of settling the valuation which was to affect his rights, yet that the Commissioners did not act necessarily with all the formalities of a Court until their constitution was changed by the statute of 1707; and therefore, although it might be right and proper to have the titular present, it was not so essential as that his non-presence would vitiate the decree.

But, my Lords, it is a fundamental principle in the administration of justice that all parties to be affected by a decree should have an opportunity of appearing; or, being summoned, should actually appear—before the tribunal pronouncing it. The necessity of the titular's presence suggests a strong argument for holding that the Earl of *Buccleuch* was that which he described himself, namely, a person entitled to appear before the Commissioners, and whose appearance justified them in coming to the conclusion that they might make a full and complete and permanent valuation. Because, in the first place, the words of the instrument import a perpetual valuation for all time coming. Secondly, the Lords Commissioners must be held to have been aware of the duties imposed upon them, and the mode in which those duties ought to be carried into effect; and I must suppose them to have been fully and perfectly conscious that they could not bind the rights of an absent party, and make a perpetual valuation as between persons who did not represent a continuing interest. We must therefore come to the conclusion that they satisfied themselves that they had before them the proper parties, unless it appear manifestly and clearly upon the face of the instrument that those parties were not present.

I agree with the suggestion of the Lord Advocate, that where

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you have before you a solemn instrument, you are not, on account of its antiquity, to assume the existence of formalities which appear to have been omitted. But here we have only the decree as it stands upon the extract.

Under these circumstances it appears to me impossible to hold that the description of "tacksman and titular" can be read as "tacksman" alone, but it must be taken to describe the Earl as having been titular as well as tacksman.

The authority principally relied upon by the Appellants was the case of *Easter Glens* (1), in which certain points appear which afford a ground for argument that a man may be described as a titular who is only a tacksman, and that a decree may purport to be made in perpetuity with regard to the interest of a person so described as "tacksman and titular," when it appears from other parts of the decree that he was not titular in any other respect than as tacksman; and that the decree, though so worded, was a decree which ought only to affect substantially the interests as between the heritor and tacksman. But on carefully examining that particular case, which was of a peculiar and singular character, I think, looking to the difference between it and this—the one reserving the rights of the titular intact, the other being without any reservation; the one shewing a dispute between the parties as to who was and who was not titular, the other giving no indication whatever of any such controversy—the precedent of *Easter Glens*, I apprehend, tends rather to confirm than otherwise the conclusion which I am inclined to draw in the present case.

That by the law of *Scotland*, a person could be both tacksman and titular at the same time there seems to be no doubt. Lord *Deas* mentions the case in which Lord *Fife* claimed, and was held to be entitled to claim, in the double character of tacksman and titular.

But we are told that, having regard to the extraneous historical circumstances of the time, it was impossible for the Earl of *Buccleuch* to have been the titular of these teinds. The Pursuers' condescendence asserts a variety of facts, which are certainly of very remarkable character, during the disturbed period in question. It begins by stating the foundation of the collegiate body of the

(1) Register of Commission of Teinds, vol. i, pp. 303, 328.

Chapel Royal of *Stirling*, which seems to have been founded by *James* IV. of *Scotland*. The condescendence then proceeds to state the confirmation of the foundation of that chapel by an Act of Parliament in 1606, which declares the title of the Crown to the whole of the possessions which were annexed to the Chapel Royal, but which also refers to the donation which had been made to the collegiate body by the Crown of the tithes of this parish and numerous other parishes; but afterwards comes this singular statement, that "at the Revolution in 1688, the teinds and the old patrimony of the Chapel Royal reverted to the Crown as *bona vacantia*." Although I have read the articles of the condescendence through several times, I confess they convey no clear, or definite, or precise idea to my mind, but only seem to me to represent that everything was in a state of confusion during that period.

But what then is there that ought to prevent us—with reference to a decree now upwards of 200 years old, and with reference to circumstances so confused according to the statement of the Pursuers themselves, that they cannot clearly enunciate the exact title upon which the teinds were held—what is there, I say, to prevent us from applying that presumption which is invariably applied to instruments of ancient date, more especially where the enjoyment appears to have been in no way inconsistent with the instrument,—namely, the presumption that all was rightly done?

I do not pause to notice the question, whether or not the valuation was properly made in respect of its being by *agreement*. Both authority and reason sanction such an arrangement, and render it binding when the parties choose to settle their dispute otherwise than by formal proof. Nor is it any objection that one of the parties, the minister, was not present at the time. He was summoned. It is not now asserted by the Appellants (though there are certain pleadings to that effect, which are not supported by any evidence whatever) that at the time when this valuation was made, it was imperfect, or improper, or insufficient.

The only other question to which I shall advert is as to how far the Appellants, claiming under a title which is not the title of the Earl of *Buccleuch*, in respect of whom the decree was made, are to be bound by the negative prescription in respect of this decree.

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I apprehend that taking them to have in any way knowledge of the decree, it is not necessary with respect to negative prescription, as it would be with reference to homologation or confirmation, that they should have done any act with intent to confirm, or any act from which that intent must be presumed; but it is quite sufficient that they must be taken to have had notice of the existence of the decree; and if they had notice of the existence of the decree, then from that time, at all events, whatever other question might arise in the case, the forty years would commence running and the negative prescription would arise.

Then had they or not notice of this decree? It appears to me that the reasons upon which Lord *Deas* rests his conclusion of their having had notice of the decree are unanswerable. Several proceedings took place, in what is called the process of augmentation and locality, with reference to the teinds. Now I apprehend it is not necessary to be shewn that those under whom the Appellants claimed had any special interest in the matter, provided they had so much interest as to be summoned to, and to be present at, those various processes. In the subsequent process of augmentation and locality which depended in the year 1733, and previously, the deans of the Chapel Royal, as donatories of the Crown, took an active part in the proceedings. But what I rely upon is, that they were summoned and appeared as parties on all occasions when the decree (which had been registered) was produced and was acted upon.

But I think the reasoning of Lord *Deas*, founded upon the subsequent renewals of the tacks, is worthy of very great consideration. When a tack of this kind is renewed, with an increasing rent or charge in respect of the renewal, are we to suppose, is anybody justified in calling upon the Court to suppose, that these renewals of interest are made without any inquiry into the circumstances of the property with which the titular is about to deal?

It seems to me that we have clear proof here of the knowledge of the existence of this valuation. If, then, there be a clear proof of notice, the negative prescription would run; and it would be impossible to contend against the terms of this decree, which appear to me conclusive of the controversy between the parties.

I have not given my mind to the question of homologation,

because the law of *Scotland* appears to be in that respect the same as the law of *England*. Not only must homologation be with full knowledge of the right, but the act done must either be with the intent and view to confirm the right, or an act necessarily in its tendency evincing an intention to confirm.

On the whole, my Lords, it appears to me that the decree was effective; and that at this distance of time it has now completely bound the rights of the parties, and prevents their questioning or disputing it. Therefore I shall move your Lordships to affirm the interlocutors complained of.

LORD WESTBURY:—

This is a proceeding of great interest and great importance to the owners of land in *Scotland*. Your Lordships are called upon to rescind, or to refuse to give effect to, a *quasi*-judicial proceeding that took place 220 years ago. You are called upon to refuse it that interpretation and validity which it has hitherto received; and under which, in fact, lands have been held, disposed of, transmitted, and enjoyed, without interruption, for more than two centuries. Now I know no greater obligation that lies upon a Court of Justice than that of supporting long continued enjoyment by every legal means, and by every reasonable presumption. And I dwell more particularly upon this obligation to presume everything that can be reasonably supposed to have existed in favour of long possession, because I do not find that principle quite so prominent as I could have desired in the judgments of the Court below, which, when they refer to this head of judicial decision, rather run off into the conclusion that the action is barred by negative prescription. The difference is very great. Negative prescription proceeds upon the foundation of the illegality and the imperfect obligation created by the thing that is challenged; but the doctrine of presumption goes on the footing of validity, and upholds validity by supposing that everything was present which that validity required. The great principle, *Omnia præsumuntur rite fuisse acta*, is the principle that ought to be observed, and not the ground that the thing itself was challengeable, but that the challenge is cut off by prescription.

The proceeding in question was a *quasi*-judicial decree in the year 1647. The original registers of these proceedings were

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destroyed by fire in the year 1700; but a remedial statute was passed in 1707, which created a special register for the extracts of the decrees that had perished, and gave to those extracts when registered the same validity as the original warrants would have had.

First, therefore, with regard to this decree, the extract only of which is before us, we are not to impute to it the absence of any necessary formality. We may well assume that that formality would be found to have existed if the original decree had been preserved; and the absence of formality may well be accounted for by the fact that we have nothing more than an imperfect extract of that original decree.

The first objection which is made to this decree is, that the owner of the teinds, the "titular," as he is called in *Scotland*, does not appear to have been called in the proceeding. I cannot admit that this decree is to be judged of by the same rules which are applied to the records of judicial proceedings; neither can I admit that it must be inferred that the true titular was not called in this proceeding. I mention that particularly, because although the observation is not necessary for the determination of this cause, yet I desire to have it understood that I am by no means willing to accept as a conclusive objection to the validity of a decree, the fact that the calling of the titular does not appear clearly on the records of the proceedings. It by no means follows that it may not be assumed to have been done, although the fact that it was done is not entered upon the record of the proceedings.

But in the present case the objections on this head are two. First, upon the construction of the decree; and secondly, upon the objections to the agreement extrinsic to the decree itself.

First, with regard to the construction of the decree, it is said to be manifest that the Earl of *Buccleuch*, who was the acknowledged tacksman of the teinds, was not there present in the character of titular. I can by no means accept such interpretation. The words must have their simple meaning ascribed to them. Tacksman is one character and titular is another character; and the superaddition of "titular" to "tacksman" must, in conformity with every rule of construction, be held to denote that the Earl was

there present and acting in the agreement not merely in the character of tacksman, but also in the additional character of titular. And that might well be; for it by no means follows as a proposition of Scotch law that if a man be tacksman he cannot also be titular. The objection is founded, probably, upon the notion of English lawyers, that the tack or lease would merge in the reversion; but that is by no means the rule of the Scotch law. The two legal characters and positions of ownership as tacksman and titular may well co-exist in one and the same person, and the identity of the legal effect of each be preserved, without their being injured by being brought into contact with one another.

It is then said that it is quite plain that the agreement ought to be construed as an agreement of a temporary character. It is impossible so to construe it consistently with the language of the agreement. The agreement purports be an agreement to last for all time coming. That is the character which it ascribes to itself —that is the character in which it was received by the Commissioners—that is the character and effect of the agreement to which the authority of the Commissioners and their decree are interposed. We have therefore a proceeding in which this agreement was taken as an agreement to last for ever; and in that capacity it was received by the persons exercising the duty of examining it, and the duty of giving it a *quasi*-judicial character, and with that view, and as having that force and effect, they do decree that it shall have that effect in all time to come.

Then we are told that it was impossible that the Earl of *Buccleuch* could have been titular. And it is upon the supposed proof of that impossibility that we are called upon to reduce the agreement and, if we do not utterly rescind it, to give it the limited construction of being an agreement of a temporary kind. My Lords, that proof is an undertaking on the part of the Appellants, which it is impossible for any man to discharge. It is impossible for the Appellants, or for any man to prove that the Earl of *Buccleuch* had not obtained, even if it was only *pro hac vice*, a grant of the titularity, or a delegation from the titular, to represent the titular in this proceeding. And in conformity with the principles to which I have already referred, I should have no hesitation in declaring myself under an obligation to assume that there had been a grant

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of the titularity validly made to the Earl of *Buccleuch*, even if I were also obliged to assume that the Earl afterwards made a surrender of that grant, in order to lay a foundation for the subsequent grant which appears to have been made by the Crown. A presumption of that kind would be much less violent than other presumptions which have been made both in the law of *England* and in the law of *Scotland*—and it is a presumption which is required by the reason of the thing, and by the circumstances of the case—because if you find a proceeding which has been accepted and fully recognized as having had entire legal validity for a period of two centuries, you are compelled by that fact to arrive at the conclusion that the proceeding was unchallengeable; and then if you are asked to shew how it became unchallengeable, there is no difficulty in pointing out a legal mode of proceeding that would have given it that character, and which ought to be presumed as a thing that was possible.

It is said, in addition to this, that the decree is not only bad on the grounds I have mentioned, but that it is bad also upon another ground, namely, that it did not proceed in the legal and required mode of taking evidence of the value of the teinds; in other words, that an agreement between the parties ought not to have been substituted for evidence of the value. Now this is an objection which (independently of everything else) is incapable of being made by those who do not even aver or attempt to prove that the valuation given to the teinds by the agreement in the year 1647 was less than the actual value. The £210 per annum Scots, which is the valuation given by the agreement, is not attempted by the Pursuers to be challenged on the ground that it was less than the actual value of the teinds. It is impossible, however, to hold that there is any validity in this objection, because the industry of the parties has collected together a great number of instances of valuations of this description, proceeding not upon testimony, but upon that which supersedes testimony, namely, the agreement and confession of the parties. And it would be impossible therefore to hold that a valuation founded upon agreement was not a valuation upon testimony, or upon confession, which is superior to testimony.

It is unnecessary, therefore, if we take this view of the subject,

namely, that the thing had validity, and must be deemed to be complete in all legal requirements, to advert to the minor ground, which would exclude it from being challenged, even if it were supposed to be objectionable; but that minor ground would be quite sufficient for our determination. And undoubtedly it stands forth in a manner most intelligible. This decree was recorded under the remedial statute of 1707, in the year 1733. That appears to have been done at the time, with reference to a proceeding of locality and augmentation of stipend which took place in the year 1733. It is clear that either the Crown itself, or, at all events, the donatories of the Crown, were parties to that proceeding. The valuation itself must have been used or adverted to in that proceeding. The donatories, therefore, that is, the grantees of the titularity, had, in 1733, proof that this decree of 1647 was relied upon as a living and valid thing, not as a thing that was defunct or expired, but a thing which fixed the existing valuation of the teinds, and was treated by the heritors as their title deed, by which the teinds had been conveyed to the heritors in consideration of the estate being charged with a commuted money charge instead of the teinds themselves.

There are several other proceedings of subsequent dates all pregnant with the same conclusion. They are all occasions on which the decree of 1647 was appealed to as a thing of force, and upon which the heritors could rely. It was therefore on those occasions brought home to the knowledge of the donatories that there was this instrument set up against their title. And if they did not acquiesce in the meaning attributed to it, it was their bounden duty at once to challenge it and attempt to set it aside. That they have not done. I advert to this not so much for the sake of setting up the negative prescription, as for the purpose of using this conduct, and these acts, and this acquiescence, as a confirmation of the justice and reasonableness of the great presumption which I draw—that the proceeding of 1647 had everything that was required to give it legal validity, and that therefore it ought not at this period to be challenged.

My Lords, I hope that your Lordships will, and it is most material for the interests of Scotch landowners that you should, affirm these interlocutors, and dismiss this appeal with costs.

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LORD COLONSAY:—

My Lords, I had occasion to consider this case carefully in the Court below, and I have listened with great interest to the arguments at the Bar of this House. The judgment which I gave in the Court below I endeavoured to condense as much as I could, and to embrace in it, more as propositions than as matter of argument, the views which I entertained. I have great satisfaction in finding that those views have now been confirmed by my noble and learned friends who have addressed the House; and, looking at the position of matters, and at the business which we have to go through, I think it unnecessary to say more than that I now hold my former judgment as repeated here (1).

*Interlocutors complained of affirmed, and appeal dismissed with costs.*

Solicitors for the Appellants: *Connell & Hope.*
Solicitors for the Respondents: *Loch & McLaurin.*

(1) See 3rd Series, vol. v. p. 449.

GEORGE UDNY . . . . . APPELLANT;
JOHN HENRY UDNY . . . . . RESPONDENT.

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*Political and Civil Status—Allegiance distinguished from Domicil.*

Every individual at his birth becomes the subject of some particular country by the tie of natural allegiance, which fixes his *political status;* and becomes subject to the law of the domicil, which determines his *civil status.*

*Per* LORD WESTBURY:—To suppose that for a change of domicil there must be a change of natural allegiance is to confound the political and the civil *status,* and to destroy the distinction between *patria* and *domicilium.*

*Per* THE LORD CHANCELLOR (1):—A man may change his domicil as often as he pleases, but not his allegiance. *Exuere patriam* is beyond his power. *Dictum* of Lord *Kingsdown* in *Moorhouse* v. *Lord* (2) qualified.

*Domicil of Origin.*

*Per* LORD WESTBURY:—It is a settled principle that no man shall be without a domicil; and to secure this end the law attributes to every individual as soon as he is born the domicil of his father if the child be legitimate, and the domicil of his mother if the child be illegitimate. This is called the domicil of origin, and is involuntary. It is the creation of law—not of the party. It may be extinguished by act of law, as, for example, by sentence of death or exile for life, which puts an end to the *status civilis* of the criminal; but it cannot be destroyed by the will and act of the party.

*Domicils of Origin and of Choice distinguished.*

Domicil of choice is the creation of the party. When a domicil of choice is acquired the domicil of origin is in abeyance; but is not absolutely extinguished or obliterated.

When a domicil of choice is abandoned, the domicil of origin revives,—a special intention to revert to it being unnecessary.

*Per* LORD CHELMSFORD:—*Story* says that the moment a foreign domicil is abandoned, the native domicil is re-acquired. The word "re-acquired" is an inaccurate expression. The meaning is, that the abandonment of an acquired domicil *ipso facto* restores the domicil of origin.

If after having acquired a domicil of choice a man abandons it and travels in search of another domicil of choice, the domicil of origin comes instantly into action and continues until a second domicil of choice has been acquired.

*Per* LORD WESTBURY:—A natural-born Englishman may domicile himself in *Holland;* but if he breaks up his establishment there and quits *Holland,* declaring that he will never return, it is absurd to suppose that his Dutch domicil clings to him until he has set up his tabernacle elsewhere.

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(1) Lord *Hatherley.* (2) 10 H. L. C. 272.

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*Legitimation per subsequens Matrimonium.*

*Per* THE LORD CHANCELLOR:—The *status* of the child, with respect to its capacity to be legitimated by the subsequent marriage of its parents, depends wholly on the *status* of the putative father, not on that of the mother.

According to English law—where at the time of a bastard's birth the father has his domicil in *England*—no subsequent change of domicil can render practicable the bastard's legitimation.

THE late Colonel *John Robert Fullerton Udny*, of *Udny*, in the county of *Aberdeen*, though born at *Leghorn*, where his father was consul, had by paternity his domicil in *Scotland*. At the age of fifteen, in the year 1794, he was sent to *Edinburgh*, where he remained for three years. In 1797 he became an officer in the Guards. In 1802 he succeeded to the family estate. In 1812 he married Miss *Emily Fitzhugh*,—retired from the army,—and took upon lease a house in *London*, where he resided for thirty-two years, paying occasional visits to *Aberdeenshire*.

In 1844, having got into pecuniary difficulties, he broke up his establishment in *London* and repaired to *Boulogne*, where he remained for nine years, occasionally, as before, visiting *Scotland*. In 1846 his wife died, leaving the only child of her marriage, a son, who, in 1859, died a bachelor.

Some time after the death of his wife Colonel *Udny* formed at *Boulogne* a connection with Miss *Ann Allat*, which resulted in the birth at *Camberwell*, in *Surrey*, on the 9th of May, 1853, of a son, the above Respondent, whose parents were undoubtedly unmarried when he came into the world. They were, however, united afterwards in holy matrimony at *Ormiston*, in *Scotland*, on the 2nd of January, 1854, and the question was whether the Respondent, under the circumstances of the case, had become legitimate *per subsequens matrimonium*.

The Court of Session (First Division) on the 14th of December, 1866 (1), decided that Colonel *Udny's* domicil of origin was Scotch, and that he had never altered or lost it, notwithstanding his long absences from *Scotland*. They therefore found that his son, the Respondent, "though illegitimate at his birth, was legitimated by the subsequent marriage of his parents." Hence this appeal, which the House regarded as involving questions of greatly more than ordinary importance.

(1) 3rd Series, vol. v. p. 164.

The Appellant argued his own case.

Sir *Roundell Palmer*, Q.C., Mr. *Mellish*, Q.C., Mr. *Fraser*, and Mr. *Bristow*, appeared for the Respondent.

The following opinions of the Law Peers fully state the facts, the authorities, and the legal reasoning.

THE LORD CHANCELLOR:—

My Lords,—In this case the Appellant prays a judicial declaration that the Respondent is a bastard,—and is not entitled to succeed to the entailed estates of *Udny*, in *Aberdeenshire*.

The question depends upon what shall be determined to have been the domicil of the Respondent's father, the late Colonel *Udny*, at the time of his birth,—at the time of the Respondent's birth,—and at the time of the Colonel's marriage with the Respondent's mother.

The Appellant, who argued his case in person with very considerable ability, contended:—First: That the domicil of origin of Colonel *Udny* was English. Secondly: That even if that were not so, yet that at the time of his first marriage, in 1812, he had abandoned *Scotland* for *England*, sold his commission in the army, took a house on lease for a long term in *London*, and resided there till he left *England* for *France* in 1844, for the purpose of avoiding his creditors; and that having thus acquired an English domicil he retained it, and never re-acquired his Scotch domicil. Thirdly: That, at all events, if he did recover his Scotch domicil, yet it was not recovered at the date of the Respondent's birth in May, 1853, nor even at the date of the intermarriage of the Respondent's parents in January 1854.

As regards the first question, your Lordships did not hear the Respondents. You were satisfied that Colonel *Udny's* father, the consul, had never abandoned his Scottish domicil. Consequently you held that Colonel *Udny's* own domicil of origin was clearly Scotch, that having been the domicil of his father at the Colonel's birth.

A more difficult inquiry arose as to the domicil of Colonel *Udny* at the date of the Respondent's birth in May, 1853.

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Colonel *Udny* appears to have left the army about the same time that he married his first wife, viz. in 1812, when he executed a contract and other instruments connected with his marriage, containing provisions referable to Scottish law, and describing himself as *of Udny, in the county of Aberdeen.* He, on his marriage, however, took a long lease of a house in *London*, in which he resided till 1844. He made frequent visits to *Scotland*, but had no residence there. He at one time contemplated restoring *Udny Castle*—and even three years after he had commenced his residence in *London* appears to have still thought it possible that he might complete the restoration—and plans were about that time submitted to him for that purpose. For many years, however, he seems to have abandoned all hope of so doing, owing to his means being insufficient. He was appointed a magistrate in *Scotland*, but appears not to have acted as such. When in *Scotland* he usually resided with friends, but occasionally at hotels in the neighbourhood of his property, and he continually received detailed accounts of the estates, and took much interest in their management. His choice of *England* as a residence appears to have been considerably influenced by his taste for the sports of the turf. By his first marriage he had a son, *John Augustus Udny.*

The Judge Ordinary and the Court of Session concurred in opinion that the long and habitual residence in *England* was not sufficient to amount to an abandonment of the Colonel's Scottish domicil of origin. This point, I confess, appears to me to be one of great nicety. I am not prepared to say that I am satisfied with that conclusion; but neither should I be prepared, without further consideration, to recommend to your Lordships a reversal of the judgment appealed from on the ground that the opinions of the Court below upon this point were erroneous.

Owing to this action having been raised in the Colonel's lifetime, the Court below had the advantage of the testimony of Colonel *Udny* himself, a circumstance which does not often occur in questions of domicil. It appears to have been very candidly given, and (as was observed by the Lord Ordinary) by no means overstates the case in favour of the continuance of his Scottish domicil.

Several other witnesses were examined, who do not carry the case further. But, be this as it may, the events in the Colonel's

life, subsequent to 1844, appear to me to be those upon which the question of his domicil at the birth of the Respondent really depend.

In 1844, the Colonel, after having been involved for some time in pecuniary difficulties (owing chiefly to his connection with the turf), was compelled to leave *England*, in order to avoid his creditors. He at first thought of taking some house "in the country," by which I think he meant in the rural parts of *England;* but afterwards the pressure of creditors became too great to admit of his so doing, and he appears, in the autumn, to have visited *Scotland*, where correspondence took place between himself and his agent as to arranging a trust deed by which Colonel *Udny* and his son, *John Augustus*, were to make provision, as far as possible, for the payment of their debts. On the 2nd of October, he writes to his agent, mentioning that a creditor is pressing for immediate payment of £1200—"So let there be no time lost." And by a letter of his son of the 4th of November, 1844, it appears that his father had left *England* for *Calais* on the previous day. He about this time sold the lease of the *London* house in which he had so long resided. He sold also (as he himself states in his evidence) all his furniture and "everything that was in the house, including what had belonged to his mother, his sister, and his first wife." He went from *Calais* to *Boulogne*, and there resided in a hired house till 1853. He says in his evidence:

> When I went to *Boulogne* I had no further connection with *London*. I had a married sister living there, and various other relations. During the nine years when my head-quarters were at *Boulogne* I never resided in *London*. The time that I came over for my wife's confinement in 1853 was the first time that I had visited *London* after leaving it for *Boulogne*. I remained there at that time only about a couple of days and returned to *Boulogne*. While I was at *Boulogne* I came over more than once to *Scotland* to visit my property. These were not long visits, but I did make them.

The wife alluded to in the above statement is the mother of the Respondent. The Colonel's first wife did not go with him to *Boulogne*, but she joined him for a short time in 1845, leaving him afterwards on account of ill-health, and residing with his brother in *London*. She died in 1846.

The Colonel at *Boulogne* formed an illicit connection with the mother of the Respondent, and in May, 1853, came to *England*

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in consequence of a wish that she should be attended in her confinement by an English accoucheur; and on the 9th of May, 1853, the Respondent was born at *Camberwell.* The Colonel appears to have returned almost immediately to *Boulogne.* He had been living on a very scanty allowance—his eldest son, too, was embarrassed—and at a very early period after the birth of the Respondent the father and son appear to have thought that the birth of this child might facilitate the barring of the entail of the Scotch estates; for in a letter of the 29th of May, 1853, the Colonel writes to his son: "I shall be glad to hear of your interview with Mr. *Skinner*" (their legal adviser). "I think the great difficulty will be the uncertainty of the child's life; however, you will talk over all these matters with him."

The Colonel was advised that by marrying the Respondent's mother he might, according to the law of *Scotland,* render the Respondent legitimate, and that then the concurrence of the Appellant in barring the entail would not be requisite. The advice on this latter point was erroneous; but it is enough to say that the Colonel came over to *Scotland* in November, 1853, clearly with the intent to celebrate a marriage with the Respondent's mother, and with the hope of raising money for the benefit of his elder son and himself by getting rid of the entail. He was under an impression that his English creditors could not molest him whilst in *Scotland.* He was much mortified afterwards to find that this was not the case, and wrote several letters to his son and others expressive of his disgust at having been hurried away from *Boulogne,* and his dislike to residing in *Scotland.* But I cannot bring my mind to doubt that his intention in returning to *Scotland* was to do that which he accomplished, namely, to marry, in regular form, the Respondent's mother, and for that purpose to be domiciled there.

In his letter of the 9th of July, 1859, he expressly asserts it to have been his intention in 1853 to be permanently domiciled in *Scotland;* but that letter may be open to the objection that it was written very shortly *ante litem motam.* I do not think that we can safely rely on the deed of disposition by his elder son of the 2nd of December, 1853, which recites "that the Colonel had made arrangements to return again to and to remain in *Scotland,*" because the father was not a party to that instrument. But, on the other hand, though the

recital itself may not be evidence, yet the Colonel took advantage of that instrument. And the whole course of the arrangements made shews that the Colonel's intent, for which alone he came to *Scotland*, was by his marriage to make the Respondent legitimate, and by means of that legitimation to deal with the estates. These objects required a Scottish domicil; and it would be singular to hold that he having, in fact, married on the 2nd of January, 1854, and resided in *Scotland* thenceforth to his death in 1861 (after the raising of the present action), the domicil must not be taken to have been Scottish, as it ought to be, for the purposes he had in view from the time of his return in 1853. It is true that the death of his elder son in the interval between the marriage and death of the Colonel, and the consequent falling in of the policies of insurance on his life, placed the Colonel to a certain degree in an easier position, and removed his apprehension of difficulty from his creditors: but I think his possible intention to leave *Scotland* (if molested by creditors) in no way disproves the existence of a resolution to remain, as he did, in that country (if allowed so to do) as his chosen and settled abode.

It seems therefore clear to me that the Colonel was, at the time of his marriage, domiciled in *Scotland;* but the question remains as to what was his domicil in May, 1853, at the time of the Respondent's birth.

If he were domiciled in *England* up to 1844, and retained an English domicil up to and after May, 1853, then the question would arise, which has not been determined in any case by the Scottish Courts, whether the child, being illegitimate at its birth, and its putative father not having at that time a power of legitimating him by means of a subsequent marriage with his mother, could be legitimated by his putative father subsequently *acquiring* a Scottish domicil before marriage with the mother.

I have myself held, and so have other Judges in the English Courts, that according to the law of *England* a bastard child whose putative father was English at its birth could not be legitimated by the father afterwards acquiring a foreign domicil and marrying the mother in a country by the law of which a subsequent marriage would have legitimated the child. I see no reason to retract that opinion. The *status* of the child,—with respect to its capacity to

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be legitimated by the subsequent marriage of its parents,—depends wholly on the *status* of the putative father, not on that of the mother. If the putative father have an English domicil the English law does not, at the birth of the child, take notice of the putative father's existence. But if his domicil be Scottish, or of any other country allowing legitimation, though the mother be English at the birth, the putative father (as in *Munro* v. *Munro* (1) ) is capable of legitimating the child. The foreign law, though deeming the child to be *filius nullius* at birth, yet recognises the father as such at the moment of his acknowledging the child, either by marriage and formal recognition, as in *France*, or by marriage only, as in *Scotland*. I do not think that the English law can recognise a capacity in any Englishman, by a change of domicil, to cause his paternity and consequent power of legitimation to be recognised. But however this may be, the question does not, in my judgment, here arise.

I am of opinion that the English domicil of Colonel *Udny*, if it were ever acquired, was formally and completely abandoned in 1844 when he sold his house and broke up his English establishment with the intention not to return. And, indeed, his return to that country was barred against him by the continued threat of process by his creditors. I think that on such abandonment his domicil of origin revived. It is clear that by our law a man must have some domicil, and must have a single domicil. It is clear, on the evidence, that the Colonel did not contemplate residing in *France*—and, indeed, that has scarcely been contended for by the Appellant. But the Appellant contends that when once a new domicil is acquired, the domicil of origin is obliterated, and cannot be re-acquired more readily or by any other means than those by which the first change of the original domicil is brought about, namely, *animo et facto*. He relied for this proposition on the decision in *Munroe* v. *Douglas* (2), where Sir *John Leach* certainly held that a Scotsman, having acquired an Anglo-Indian domicil, and having finally quitted *India*, but not yet having settled elsewhere, did not re-acquire his original domicil; saying expressly, "I can find no difference in principle between an original domicil and an acquired domicil." That he acquired no new

(1) 7 Cl. & F. 842. (2) 5 Madd. 379.

domicil may be conceded, but it appears to me that sufficient weight was not given to the effect of the domicil of origin, and that there is a very substantial difference in principle between an original and an acquired domicil. I shall not add to the many ineffectual attempts to define domicil. But the domicil of origin is a matter wholly irrespective of any animus on the part of its subject. He acquires a certain *status civilis*, as one of your Lordships has designated it, which subjects him and his property to the municipal jurisdiction of a country which he may never even have seen, and in which he may never reside during the whole course of his life, his domicil being simply determined by that of his father. A change of that domicil can only be effected *animo et facto*—that is to say, by the choice of another domicil, evidenced by residence within the territorial limits to which the jurisdiction of the new domicil extends. He, in making this change, does an act which is more nearly designated by the word "settling" than by any one word in our language. Thus we speak of a colonist settling in *Canada* or *Australia*, or of a Scotsman settling in *England*, and the word is frequently used as expressive of the act of change of domicil in the various judgments pronounced by our Courts. But this settlement *animo et facto* by which the new domicil is acquired is, of course, susceptible of abandonment if the intention be evidenced by facts as decisive as those which evidenced its acquirement.

It is said by Sir *John Leach*, that the change of the newly-acquired domicil can only be evidenced by an actual settling elsewhere, or (which is, however, a remarkable qualification) by the subject of the change dying *in itinere* when about to settle himself elsewhere. But the dying *in itinere* to a wholly new domicil would not, I apprehend, change a domicil of origin if the intended new domicil were never reached. So that at once a distinction is admitted between what is necessary to re-acquire the original domicil and the acquiring of a third domicil. Indeed, the admission of Sir *John Leach* seems to have been founded on the actual decision of the case of *Colville* v. *Saunders*, cited in full in *Munroe* v. *Douglas*, from the Dictionary of Decisions. In that case, a person of Scottish origin became domiciled at *St. Vincent*, but left that island, writing to his father and saying that his health was injured,

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and he was going to *America;* and that if he did not succeed in *America* he would return to his native country. He was drowned in *Canada*, and some memoranda were found indicating an intention to return to *Scotland*, and it was held that his Scottish domicil had revived.

It seems reasonable to say that if the choice of a new abode and actual settlement there constitute a change of the original domicil, then the exact converse of such a procedure, viz., the intention to abandon the new domicil, and an actual abandonment of it, ought to be equally effective to destroy the new domicil. That which may be acquired may surely be abandoned, and though a man cannot, for civil reasons, be left without a domicil, no such difficulty arises if it be simply held that the original domicil revives. That original domicil depended not on choice but attached itself to its subject on his birth, and it seems to me consonant both to convenience and to the currency of the whole law of domicil to hold that the man born with a domicil may shift and vary it as often as he pleases, indicating each change by intention and act, whether in its acquisition or abandonment; and further, to hold that every acquired domicil is capable of simple abandonment *animo et facto* the process by which it was acquired, without its being necessary that a new one should be at the same time chosen, otherwise one is driven to the absurdity of asserting a person to be domiciled in a country which he has resolutely forsaken and cast off, simply because he may (perhaps for years) be deliberating before he settles himself elsewhere. Why should not the domicil of origin cast on him by no choice of his own, and changed for a time, be the state to which he naturally falls back when his first choice has been abandoned *animo et facto*, and whilst he is deliberating before he makes a second choice.

Lord *Cottenham* in *Munro* v. *Munro* (1) says, "So firmly indeed did the civil law consider the domicil of origin to adhere that it holds that if it be actually abandoned and a domicil acquired, but that again abandoned, and no new domicil acquired in its place, the domicil of origin revives." No authority is cited by his Lordship for this. He probably alluded to some observations which

(1) 7 Cl. & F. 871.

occur in the case of *La Virginie* (1) where Sir *William Scott* said:

> It is always to be remembered that the native character easily reverts, and that it requires fewer circumstances to constitute domicil in the case of a native subject than to impress the national character on one who is originally of another country.

In the case of *The Indian Chief* (2) the question was whether the ship was the property of a British subject; for if so, her trading was illegal. The owner, Mr. *Johnson*, averred that he was an American. Sir *William Scott* held him to be an American by origin, but that having come to *England* in 1783 and remained till 1797, he had become an English merchant. But he quitted *England* before the capture of the vessel, and letters were produced shewing his intention to return to *America*, which he does not appear to have reached until after. And Sir *William Scott* says, "The ship arrives a few weeks after his departure, and taking it to be clear that the natural character of Mr. *Johnson* as a British merchant was founded on residence only, that it was acquired by residence, and rested on that circumstance alone, it must be held that from the moment he turned his back on the country where he had resided on his way to his own country he was in the act of resuming his original character, and is to be considered as an American. The character that is gained by residence ceases by residence. It is an adventitious character which no longer adheres to him from the moment that he puts himself in motion *bonâ fide* to quit the country *sine animo revertendi*."

*Story*, in his Conflict of Laws, sect. 47 (at the end), says: "If a man has acquired a new domicil different from that of his birth, and he removes from it with intention to resume his native domicil, the latter is re-acquired even while he is on his way, for it reverts from the moment the other is given up."

The qualification that he must abandon the new domicil with the special intent to resume that of origin is not, I think, a reasonable deduction from the rules already laid down by decision, because intent not followed by a definitive act is not sufficient. The more consistent theory is, that the abandonment of the new domi-

(1) 5 Rob. Adm. 99. (2) 3 Rob. Adm. 12.

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cil is complete *animo et facto*, because the *factum* is the abandonment, the *animus* is that of never returning.

I have stated my opinion more at length than I should have done were it not of great importance that some fixed common principles should guide the Courts in every country on international questions. In questions of international law we should not depart from any settled decisions, nor lay down any doctrine inconsistent with them. I think some of the expressions used in former cases as to the intent "*exuere patriam*," or to become "a Frenchman instead of a Englishman," go beyond the question of domicil. The question of naturalization and of allegiance is distinct from that of domicil. A man may continue to be an Englishman, and yet his contracts and the succession to his estate may have to be determined by the law of the country in which he has chosen to settle himself. He cannot, at present at least, put off and resume at will obligations of obedience to the government of the country of which at his birth he is a subject, but he may many times change his domicil. It appears to me, however, that each acquired domicil may be also successively abandoned *simpliciter*, and that thereupon the original domicil *simpliciter* reverts.

For these reasons, my Lords, I propose to your Lordships the affirmation of the interlocutors complained of, and the dismissal of the appeal with costs.

LORD CHELMSFORD:—

My Lords, at the opening of the argument of this appeal for the Respondent his learned counsel were informed that your Lordships were of opinion that the domicil of Colonel *Udny* down to the year 1812 was his Scotch domicil of origin, and that the case was therefore narrowed down to the questions raised by the Appellant, —whether that domicil had been superseded by the acquisition of another domicil in *England*, and whether such after-acquired domicil was retained at the time of the birth of the Respondent, and continued down to the period of the marriage of the Respondent's parents in *Scotland*.

In considering these questions it will be necessary to ascertain the nature and effect of a domicil of origin; whether it is like an after-acquired domicil, which when it is relinquished can be re-ac-

quired only in the same manner in which it was originally acquired, or whether, in the absence of any other domicil, the domicil of origin must not be had recourse to for the purpose of determining any question which may arise as to a party's personal rights and relations.

*Story*, in his Conflict of Laws (sect. 48), says, "The moment a foreign domicil is abandoned the native domicil is re-acquired." Great stress was laid by the Appellant in his reference to this passage upon the word "re-acquired," which is obviously an inaccurate expression. For, as was pointed out in the course of the argument, a domicil of origin is not an acquired domicil, but one which is attributed to every person by law. The meaning of *Story*, therefore, clearly is, that the abandonment of a subsequently-acquired domicil *ipso facto* restores the domicil of origin. And this doctrine appears to be founded upon principle, if not upon direct authority.

It is undoubted law that no one can be without a domicil. If, then, a person has left his native domicil and acquired a new one, which he afterwards abandons, what domicil must be resorted to to determine and regulate his personal *status* and rights? Sir *John Leach*, V.C., in *Munroe* v. *Douglas* (1), held that in the case supposed the acquired domicil attaches to the person till the complete acquisition of a subsequent domicil, and (as to this point) he said there was no difference in principle between the original domicil and an acquired domicil. His Honour's words are: "A domicil cannot be lost by mere abandonment. It is not to be defeated *animo* merely, but *animo et facto*, and necessarily remains until a subsequent domicil be acquired, unless the party die *in itinere* towards an intended domicil." There is an apparent inconsistency in this passage, for the Vice-Chancellor having said that a domicil necessarily remains until a subsequent domicil be acquired *animo et facto*, added, "unless the party die in *itinere* towards an intended domicil;" that is, at a time when the acquisition of the subsequent domicil is incomplete and rests in intention only.

I cannot understand upon what ground it can be alleged that a person may not abandon an acquired domicil altogether and carry

(1) 5 Madd. 405.

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out his intention fully by removing *animo non revertendi;* and why such abandonment should not be complete until another domicil is acquired in lieu of the one thus relinquished.

Sir *William Scott,* in the case of *The Indian Chief* (1), said: "The character that is gained by residence ceases by residence. It is an adventitious character which no longer adheres to a person from the moment he puts himself in motion *bonâ fide* to quit the country *sine animo revertendi,*" and he mentions the case of a British-born subject, who had been resident in *Surinam* and *St. Eustatius,* and had left those settlements with an intention of returning to this country, but had got no farther than *Holland,* the mother country of those settlements, when the war broke out; and it was determined by the Lords of Appeal that he was *in itinere,* that he had put himself in motion, and was in pursuit of his native British character."

Sir *John Leach* seems to me to be incorrect also in saying that in the case of the abandonment of an acquired domicil there is no difference in principle between the acquisition of an entirely new domicil and the revival of the domicil of origin. It is said by *Story,* in sect. 47 of his Conflict of Laws, that "If a man has acquired a new domicil different from that of his birth, and he removes from it with an intention to resume his native domicil, the latter is re-acquired even while he is on his way *in itinere;* for it reverts from the moment the other is given up." This certainly cannot be predicated of a person journeying towards a new domicil which it is his intention to acquire.

I do not think that the circumstances mentioned by *Story* in the above passage, viz., that the person has removed from his acquired domicil with an intention to resume his native domicil, and that he is *in itinere* for the purpose, are at all necessary to restore the domicil of origin. The true doctrine appears to me to be expressed in the last words of the passage: "It" (the domicil of origin) "reverts from the moment the other is given up."

This is a necessary conclusion if it be true that an acquired domicil ceases entirely whenever it is intentionally abandoned, and that a man can never be without a domicil. The domicil of origin always remains, as it were, in reserve, to be resorted to

(1) 3 Rob. Adm. 20.

in case no other domicil is found to exist. This appears to me to be the true principle upon this subject, and it will govern my opinion upon the present appeal.

Upon the question whether Colonel *Udny* ever acquired an English domicil which superseded his domicil of origin, there can be no doubt that his long residence in *Grosvenor Street* for the space of thirty-two years from 1812 to 1844, is calculated to produce a strong impression in favour of the acquisition of such a domicil. Time is always a material element in questions of domicil; and if there is nothing to counteract its effect, it may be conclusive upon the subject. But in a competition between a domicil of origin and an alleged subsequently-acquired domicil there may be circumstances to shew that however long a residence may have continued no intention of acquiring a domicil may have existed at any one moment during the whole of the continuance of such residence. The question in such a case is not, whether there is evidence of an intention to retain the domicil of origin, but whether it is proved that there was an intention to acquire another domicil. As already shewn, the domicil of origin remains till a new one is acquired *animo et facto*. Therefore, a wish or a desire expressed from time to time to return to the place of the first domicil, or any looking to it as the ultimate home, although wholly insufficient for the retention of the domicil of origin, may yet amount to material evidence to rebut the presumption of an intention to acquire a new domicil arising from length of residence elsewhere. In this view it would be a fair answer to the question, Did Colonel *Udny* intend to make *England* his permanent home? to point to all his acts and declarations with respect to *Scotland* and his estates there, to the offices which he held, to the institutions to which he belonged, and to his subscriptions to local objects, shewing, that though his pursuits drew him to *England* and kept him there, and his circumstances prevented his making *Udny Castle* fit for his residence, he always entertained a hope, if not an expectation, that a change in his fortunes might eventually enable him to appear in his country of origin, and to assume his proper position there as a Scotch proprietor.

If the residence in *England* began under circumstances which indicate no intention that it was to be permanent, when did it

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assume the character of permanence by proof that the Colonel had intentionally given up his Scotch domicil and adopted a different one? It appears to me upon this question of fact, that throughout the whole of the Colonel's residence in *London* there was always absent the intention to make it his permanent home which is essential to constitute a domicil; residence alone, however long, being immaterial unless coupled with such intention. But even if it should be considered that Colonel *Udny's* residence in *England*, though not originally intended to be his permanent home, after a certain length of time ripened into a domicil, yet in 1844 he gave up the house in *Grosvenor Street* and returned to *Boulogne*, where he remained for nine years without any apparent intention of again taking up his residence in *England*. This abandonment of the English residence, both in will and deed, although accompanied with no immediate intention of resuming the Scotch domicil, put an end at once to the English domicil, and the domicil of origin *ipso facto* became the domicil by which the personal rights of Colonel *Udny* were thenceforth to be regulated.

This makes it unnecessary to consider what would have been the condition of the Respondent if his birth had taken place in *England* before the resumption of the Scotch domicil by Colonel *Udny*, and the subsequent marriage of his parents in *Scotland* after that domicil had been resumed. Because the domicil being Scotch, the place of the birth of the Respondent is wholly immaterial, and the case is completely governed by the authority of the cases of *Dalhousie* v. *McDouall* (1) and *Munro* v. *Munro* (2), in each of which the birth of the illegitimate child, and also the subsequent marriage of the parents, took place in *England*, but the domicil being Scotch it was held that neither the place of the marriage nor the place of the birth affected the *status* of the child.

The existence of the Scotch domicil renders it also unnecessary to consider whether the parents of the Respondent went to *Scotland* for the purpose merely of legitimating the Respondent by their marriage there, and deprives the case of *Rose* v. *Ross* (3), which was insisted upon by the Appellant, of all application. For in that

(1) 7 Cl. & F. 817. (2) Ibid. 842.
(3) 4 Wils. & Shaw, 289.

case, as stated by the Lord Chancellor, "the parties were domiciled in *England*, the child was born in *England*, the parties went to *Scotland* for the purpose expressly of being married, and having been married they returned to *England* to the place of their former domicil."

I agree with my noble and learned friend that the interlocutors appealed from ought to be affirmed.

LORD WESTBURY :—

The law of *England*, and of almost all civilized countries, ascribes to each individual at his birth two distinct legal states or conditions; one by virtue of which he becomes the subject of some particular country, binding him by the tie of natural allegiance, and which may be called his political *status;* another, by virtue of which he has ascribed to him the character of a citizen of some particular country, and as such is possessed of certain municipal rights, and subject to certain obligations, which latter character is the civil *status* or condition of the individual, and may be quite different from his political *status.* The political *status* may depend on different laws in different countries; whereas the civil *status* is governed universally by one single principle, namely, that of domicil, which is the criterion established by law for the purpose of determining civil *status.* For it is on this basis that the personal rights of the party, that is to say, the law which determines his majority or minority, his marriage, succession, testacy, or intestacy, must depend. International law depends on rules which, being in great measure derived from the Roman law, are common to the jurisprudence of all civilized nations. It is a settled principle that no man shall be without a domicil, and to secure this result the law attributes to every individual as soon as he is born the domicil of his father, if the child be legitimate, and the domicil of the mother if illegitimate. This has been called the domicil of origin, and is involuntary. Other domicils, including domicil by operation of law, as on marriage, are domicils of choice. For as soon as an individual is *sui juris* it is competent to him to elect and assume another domicil, the continuance of which depends upon his will and act. When another domicil is put on, the domicil of origin is for that purpose relinquished, and

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remains in abeyance during the continuance of the domicil of choice; but as the domicil of origin is the creature of law, and independent of the will of the party, it would be inconsistent with the principles on which it is by law created and ascribed, to suppose that it is capable of being by the act of the party entirely obliterated and extinguished. It revives and exists whenever there is no other domicil, and it does not require to be regained or reconstituted *animo et facto*, in the manner which is necessary for the acquisition of a domicil of choice.

Domicil of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with an intention of continuing to reside there for an unlimited time. This is a description of the circumstances which create or constitute a domicil, and not a definition of the term. There must be a residence freely chosen, and not prescribed or dictated by any external necessity, such as the duties of office, the demands of creditors, or the relief from illness; and it must be residence fixed not for a limited period or particular purpose, but general and indefinite in its future contemplation. It is true that residence originally temporary, or intended for a limited period, may afterwards become general and unlimited, and in such a case so soon as the change of purpose, or *animus manendi*, can be inferred the fact of domicil is established.

The domicil of origin may be extinguished by act of law, as, for example, by sentence of death or exile for life, which puts an end to the *status civilis* of the criminal; but it cannot be destroyed by the will and act of the party.

Domicil of choice, as it is gained *animo et facto*, so it may be put an end to in the same manner. Expressions are found in some books, and in one or two cases, that the first or existing domicil remains until another is acquired. This is true if applied to the domicil of origin, but cannot be true if such general words were intended (which is not probable) to convey the conclusion that a domicil of choice, though unequivocally relinquished and abandoned, clings, in despite of his will and acts, to the party, until another domicil has *animo et facto* been acquired. The cases to which I have referred are, in my opinion, met and controlled by

other decisions. A natural-born Englishman may, if he domiciles himself in *Holland*, acquire and have the *status civilis* of a Dutchman, which is of course ascribed to him in respect of his settled abode in the land, but if he breaks up his establishment, sells his house and furniture, discharges his servants, and quits *Holland*, declaring that he will never return to it again, and taking with him his wife and children, for the purpose of travelling in *France* or *Italy* in search of another place of residence, is it meant to be said that he carries his Dutch domicil, that is, his Dutch citizenship, at his back, and that it clings to him pertinaciously until he has finally set up his tabernacle in another country? Such a conclusion would be absurd; but there is no absurdity and, on the contrary, much reason, in holding that an acquired domicil may be effectually abandoned by unequivocal intention and act; and that when it is so determined the domicil of origin revives until a new domicil of choice be acquired. According to the *dicta* in the books and cases referred to, if the Englishman whose case we have been supposing lived for twenty years after he had finally quitted *Holland*, without acquiring a new domicil, and afterwards died intestate, his personal estate would be administered according to the law of *Holland*, and not according to that of his native country. This is an irrational consequence of the supposed rule. But when a proposition supposed to be authorized by one or more decisions involves absurd results, there is great reason for believing that no such rule was intended to be laid down.

In Mr. Justice *Story's* Conflict of Laws (the last edition) it is stated that "the moment the foreign domicil (that is the domicil of choice) is abandoned, the native domicil or domicil of origin is re-acquired."

And such appears to be the just conclusion from several decided cases, as well as from the principles of the law of domicil.

In adverting to Mr. Justice *Story's* work, I am obliged to dissent from a conclusion stated in the last edition of that useful book, and which is thus expressed, "The result of the more recent English cases seems to be, that for a change of national domicil there must be a definite and effectual change of nationality." In support of this proposition the editor refers to some words which appear to have fallen from a noble and learned lord in addressing

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this House in the case of *Moorhouse* v. *Lord* (1), when in speaking of the acquisition of a French domicil, Lord *Kingsdown* says, "A man must intend to become a Frenchman instead of an Englishman."

These words are likely to mislead, if they were intended to signify that for a change of domicil there must be a change of nationality, that is, of natural allegiance.

That would be to confound the political and civil states of an individual, and to destroy the difference between *patria* and *domicilium*.

The application of these general rules to the circumstances of the present case is very simple. I concur with my noble and learned friend that the father of Colonel *Udny*, the consul at *Leghorn*, and afterwards at *Venice*, and again at *Leghorn*, did not by his residence there in that capacity lose his Scotch domicil. Colonel *Udny* was, therefore, a Scotchman by birth. But I am certainly inclined to think that when Colonel *Udny* married, and (to use the ordinary phrase) settled in life and took a long lease of a house in *Grosvenor Street*, and made that a place of abode of himself and his wife and children, becoming, in point of fact, subject to the municipal duties of a resident in that locality; and when he had remained there for a period, I think, of thirty-two years, there being no obstacle in point of fortune, occupation, or duty, to his going to reside in his native country; under these circumstances, I should come to the conclusion, if it were necessary to decide the point, that Colonel *Udny* deliberately chose and acquired an English domicil. But if he did so, he as certainly relinquished that English domicil in the most effectual way by selling or surrendering the lease of his house, selling his furniture, discharging his servants, and leaving *London* in a manner which removes all doubt of his ever intending to return there for the purpose of residence. If, therefore, he acquired an English domicil he abandoned it absolutely *animo et facto*. Its acquisition being a thing of choice, it was equally put an end to by choice. He lost it the moment he set foot on the steamer to go to *Boulogne*, and at the same time his domicil of origin revived. The rest is plain. The marriage and the consequences of that marriage

(1) 10 H. L. C. 272.

must be determined by the law of *Scotland*, the country of his domicil.

LORD COLONSAY:—

I regard this case as one of very considerable importance, inasmuch as it has afforded an opportunity for bringing out, more clearly than has been done in any of the former cases, the radical distinction between domicil of origin and domicil of choice. The principles of that distinction and the facts have been so clearly put before the House that I need do no more than express my concurrence.

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JUDGMENT:—Ordered and Adjudged, that the said interlocutor of the Lords of Session in *Scotland*, of the Second Division, of the 14th of December, 1866, complained of in the said appeal, be varied by substituting for the words "that he never lost his said domicil of origin" these words, "and that if such domicil of origin was ever changed, yet by leaving *England* in 1844 his domicil of origin reverted;" and that, with this variation, the said interlocutor be, and the same is, hereby affirmed, and that the said petition and appeal be, and the same is, hereby dismissed this House.

Solicitors for the Appellant: *Coverdale, Lee, Bristow, & Withers.*
Solicitors for the Respondent: *White, Broughton, & White.*

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*July* 15. THE EARL OF DALHOUSIE *et al.* . . . . RESPONDENTS.

*Perpetuation of Testimony—Witnesses out of the Jurisdiction.*

Proceedings under the 5 & 6 Vict. c. 69, and 22 Vict. c. 20, ought to be jealously watched.

*Per* THE LORD CHANCELLOR:—It was not intended to give a party seeking to perpetuate testimony rights stronger than those which would belong to him in an actual and present litigation.

*Subpœna duces tecum.*

A witness may well excuse himself for not bringing with him and producing documents which he has under trust, and the right to which is, or may become, the subject of litigation. He is not bound to search for them, if he shews that they are in a place to which access on his part is both legally and physically impossible.

THE Appellant, *Donald Campbell*, in the event of the death of his elder brother without issue, will be, as he contends, the next heir male of the body of *John Campbell*, first Earl of *Breadalbane;* and as such will be entitled to the honours and dignities of Earl of *Breadalbane* and *Holland*, Viscount *Tay* and *Pentland*, Baron *Glenorchy*, &c.; and also to the estates which belong to the possessor of these honours and dignities.

On the 16th of September, 1865, the Appellant filed a bill in the English Court of Chancery to perpetuate testimony for the establishment of his contingent claim. This was done under the 5 & 6 Vict. c. 69, which allowed the proceeding.

As it turned out that some of the proposed witnesses, and certain of the documents required, were in *Scotland*, the Appellant took advantage of the 22 Vict. c. 20, which provides for the taking of evidence from witnesses who, though beyond the jurisdiction of the Court, are within the Queen's dominions. One of the Vice-Chancellors was consequently asked to appoint an Examiner (Mr. *Duncan*, of the Scotch Bar) in *Scotland*. This was done; and, afterwards, a writ of *subpœna duces tecum* was sued out for service on the witnesses;—the writ setting forth the documents desired.

On the 14th of May, 1867, the Appellant petitioned the Scotch Court to order the examination of Lord *Dalhousie*, Lord *Jervis-*

*woode*, and Mr. *Currie* (trustees of the late Marquis of *Breadalbane*), and of their solicitors, Messrs. *Davidson & Syme*. The Appellant further prayed that "the said trustees should produce and exhibit the papers and writings mentioned in the *subpœna duces tecum*, or such of them as were in their possession, custody, or power."

On the 11th of June, 1867, the Court ordered the proposed witnesses to appear before the examiner for *examination;* but, *quoad ultra*, the Court superseded the consideration of the Petition;—making no order as to the production and exhibition of documents.

A correspondence then ensued between the solicitors of the Appellant and the solicitors of the Respondents in *Edinburgh*, from which it appeared that the witnesses sought to be examined were in fact the Respondents, from whom the Appellant expected the production before the Examiner of various documents and title deeds supposed to be deposited in the Charter or Muniment room of *Taymouth Castle;* of which room the Respondents had the key, but to which room they had no access, as the castle itself was in the possession of the present possessor of the estate, the Earl of *Breadalbane*.

It was, however, arranged that Lord *Jerviswoode*, one of the late Marquis's trustees, should be examined. On the 10th of October, 1867, his Lordship gave the following evidence:—

I am one of the testamentary trustees of the late Marquis of *Breadalbane*. Messrs. *Davidson & Syme*, writers to the signet, are the agents of the trustees. I have been informed by them that a list of documents and papers which the Plaintiff desires to have now exhibited, has been communicated to them as agents for the trustees, and that list I have now received. I have none of these documents or papers with me.

*Q.* Are the trustees willing to exhibit before the Examiner the documents and papers specified in that list, or any of them?

*A.* There was a key taken possession of by the trustees, after the late Marquis's death, which was understood to be the key of the charter room at *Taymouth Castle*. This key was in the hands of Messrs. *Davidson & Syme*, as agents for the trustees. It is still in their hands. There has been no search, so far as I am aware, of the room at *Taymouth Castle*, understood to be the charter room, for any of the documents or papers in said list. I cannot say that the trustees will undertake a search of this room. I may say that they will not make such a search, unless under the authority or order of the Court.

*Re-examined.*—I understand the reason why the trustees will not search for or exhibit the documents and papers called for without judicial authority to be, because there is a question raised as to the party who has right to the documents

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in the charter room, or connected with the family or estates, and that they think it proper to do nothing in the matter without judicial authority.

The Appellant was not satisfied with the explanation of Lord *Jerviswoode*. Accordingly, on the 26th of November, 1867, he presented to the Court of Session a supplemental Petition, praying an order upon the Respondents to search for and exhibit the documents in question.

The Court of Session, however, refused this application, holding that under the extraordinary circumstances of the case the Petition must be refused (1). Hence the present appeal to the House.

Mr. *Anderson*, Q.C., Mr. *Prentice*, Q.C., and Mr. *Steele*, were of Counsel for the Appellant.

Mr. *Pearson*, Q.C., and Mr. *Stair Agnew*, appeared for the Respondents.

The *Solicitor-General for Scotland* (2), Sir *Roundell Palmer*, Q.C., and Mr. *Mellish*, Q.C., for Lord *Breadalbane*, who had intervened in the suit, and opposed the Appellant's application.

The following opinions were delivered by the Law Peers:—

THE LORD CHANCELLOR (3):—

The parties against whom this order is asked are not engaged in the litigation. They are simply witnesses subpœnaed in a suit as to possible rights which may arise to the Appellant on the death of his elder brother without issue.

A bill having been filed to perpetuate testimony, all that is now essential to observe is, that a *subpœna duces tecum* was issued.

It behoves us, however, to be very careful in watching over the course of procedure under the powers given by the 5 & 6 Vict. c. 69, and the extensive jurisdiction which is afterwards given by the 22 Vict. c. 20. It was not intended to give a litigant who wished to perpetuate testimony, as against a person with whom he contemplated a future litigation, rights of any stronger character than those which would be possessed by him in case the Defendant were an actual Defendant without any obstacle to the immediate prose-

(1) Session Cases, 3rd Series, Vol. vi. p. 632.

(2) Mr. *Young*.

(3) Lord *Hatherley*.

cution of the suit to its ultimate result. It was not intended in any way to enlarge the rights which he might in that case possess. Now, my Lords, throughout the whole course of these proceedings there is abundant evidence of an intention on the part of this Appellant to press this Act of Parliament to an extent which certainly appears, as I read the Act, to be very foreign to the objects contemplated by it. He has an opponent against whom, when the due time comes, he sees that he shall have a case to make, and the course which he takes at present is this—he says: "I will summon as witnesses all those who are in possession of documents which relate to the title and the property of my opponent or of myself, and I will not (perhaps 'cannot,' seeing that the time for the litigation has not yet arisen), I cannot proceed against my opponent himself in person, with reference to the production of documents relating to his title; but this I will do; I will find out who are in custody of the documents which relate to the title in question, and I will summon them as witnesses to produce those documents—not for the purpose in any way of obtaining information, especially from them, with relation to the matters to which the documents may refer, but simply because they are the persons in custody of those documents; and I shall be able to obtain from them at once a mass of information which, undoubtedly, if I were in a position to litigate the title immediately, I should not be able to get from my opponents." My Lords, it is of course that when parties are in immediate litigation they cannot, on such allegations as are here made, investigate their opponents' title deeds. The present case, therefore, I say, my Lords, is one which ought to be jealously watched.

Having obtained a *subpœna duces tecum* in *England*, and finding that some of the witnesses were resident out of the English jurisdiction, the Appellant wished to avail himself of the Act of the 22 Vict. c. 20, and he applied to the Scottish Court for an order to examine witnesses, and to compel them to search for and produce any documents in their possession. The Scottish Court in the first instance thought it right to grant him simply a power of examination. The witnesses, therefore, were ordered to be examined; but the rest of the application was—as to the search and production—postponed.

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A correspondence then took place between the Appellant's solicitor and the solicitors of the late Marquis of *Breadalbane's* trustees, who had become possessed of the key of his muniment room at *Taymouth Castle,* with reference to documents that might possibly be found in *Taymouth Castle.* And the only question founded upon that is, whether the witnesses had or had not the documents there referred to. There are few, very few, of these documents specifically described in the singularly fishing list served on the witnesses; the first few, comprising letters patent and deeds of entail, appear to be sufficiently described; but afterwards comes a long series of general headings, such as "Various Letters and Correspondence," which have passed for two centuries in the family. Then there is a number of other things, headed as "Various Deeds and Documents," plainly intended to sweep in all the information which could possibly be obtained from the trustees. That is the list which is given as the foundation for this application to search the muniment room of *Taymouth Castle,* and to ransack the whole of it for the benefit of the Plaintiff in his present investigation. Certainly the statute would be pressed to its extremest limit if it were carried to the extent here proposed with regard to information to be obtained from witnesses under a *subpœna duces tecum.*

You have Lord *Jerviswoode* stating that his reason for the non-search in the charter room, and the consequent non-production of the documents (for he knows nothing until he has searched) is, that although the trustees have the key of the room, there is a dispute between them and the other claimant, who is in possession of the property, with regard to the right to the possession of the deeds. It is upon this answer of Lord *Jerviswoode's* that the supplemental petition was presented, to which the Court in *Scotland* refused to accede; and it is that decision of the Court which your Lordships are now asked to reverse.

The Petition itself states the litigation between the present possessor of the estates and the trustees with reference to the custody of these documents. We know, therefore, on the face of the proceedings themselves, without going any further, that there is a litigation pending, and that it was pending when the application was made to the Court of Session; and an interdict had been asked against the possessor of the estates because he had threatened to

enter into this muniment room and in some way to deal with it. In the pleadings which took place upon that proceeding he positively again asserted that neither the trustees, nor any one else but himself, had any right to approach that muniment room at all. We are further informed by the trustees, as a matter of fact not denied by the possessor of the estates, that he has put a special lock upon this particular room, so as to debar the trustees from access to it. Now, in that state of circumstances no Court would say that under a *subpœna duces tecum* you could compel them to solve instantly that question of right which is in litigation, and which will be solved in due course when brought to its legitimate conclusion. To say, that because the trustees have the key of the muniment room they are therefore in a condition to comply with the exigency of a *subpœna duces tecum* would be, under the circumstances of this case, absurd.

If there had been some difficulty of a technical nature from the fact that the Scottish Court had given no order whatever for the production of the papers, the difficulty was overcome by the correspondence. All that took place in the case shews that the papers in the *Taymouth* muniment room, and these alone, were in question. And so little were any of the trustees personally acquainted with the matter, that the parties by consent took the evidence of one of them as the evidence of all. Lord *Jerviswoode* stated that he would not make the search or produce the documents without the order of the Court; but at the same time he informed those who were examining him that his reason was that the whole matter was in litigation. Therefore, legally, as well as physically, those documents are not such as the Court could by any possible means call for, and they would have been taking a step which in the result could have had no beneficial effect whatever as regards the administration of justice if they had pronounced a formal order that the witnesses were to search for and produce these documents.

It appears to me, therefore, that all that is right and just has been achieved between these parties by the order which has been made; and that, therefore, that order should be allowed to stand; that the appeal should be dismissed; and, I should suggest to your Lordships, with costs.

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LORD COLONSAY:—

It is said that the order under which Lord *Jerviswoode* was examined was imperfect;—that it was merely an order to examine him as a witness without ordering him to bring with him documents. I do not think there is anything in that objection. The order that was made as to the examination of this person was precisely in conformity with what has been asked by the Appellant in the Petition which he presented. He asked for the examination of the trustees, and for an order requiring them to produce and exhibit documents. The Court superseded the production and exhibition of the documents; but they granted all that he had asked beyond that.

If it was implied in the demand made by the party that there should be an expression in the judgment to the effect that they were to bring with them documents, though not to exhibit or to produce them, the statement in the evidence given by the trustee was a sufficient answer to his not having brought with him documents. He stated that there was a litigation in which the possessor of the estates claimed to be the party entitled to all those documents.

Then came the petition upon which the judgment now under appeal was pronounced. That petition asked for an order upon the trustees to exhibit and produce documents. In that discussion the possessor of the estates made his appearance, and the whole matter, including both the physical objection and the legal objection, was stated to the Court. All being explained, the Court did not make any order to produce documents, and they dismissed the Petition. I think there was no other course to be followed. The litigation is said to be now very nearly ready for decision. When that matter is disposed of, the present Appellant will know against whom to direct his application. I do not understand that the statute under which we are now proceeding gives a right to a party to get documents irrespectively of any valid objection which the possessor or custodier of those documents may have to state against the exhibition of them. But at present, to require that the trustees shall produce and exhibit documents when there are both physical and legal obstacles to their getting possession of them, appears to me to be quite out of the question.

LORD CAIRNS:—

If, in the first instance, when the application was made by the original Petition, the Appellant had been dissatisfied with the order then made, and had come to this House and had asked an order which would be equivalent to a *subpœna duces tecum* in this country, your Lordships might have entertained that application; and perhaps might have given him an order upon the persons supposed to hold the documents, that, like any other witnesses, they should bring those documents with them, and say whether there were or were not grounds to resist their being adduced in the proper manner as evidence in the case. But the Appellant before going into the examination of witnesses, had a correspondence with the agents of the late Marquis's trustees, in course of which it became evident that the whole question between the parties was as to certain documents supposed to exist in the muniment room of *Taymouth Castle.* The Appellant was told beforehand that the trustees conceived that they had not power to produce those documents except under some judicial order, if then; and, moreover, that questions would clearly arise as to whether they could have access to the documents even for the purpose of searching out those that were required. In that state of things one of the three trustees was called as a witness to speak for himself and the other trustees. So that the state of things which was anticipated has now been put upon record, and in substance it amounts to this:—that in their actual custody the trustees have not any documents; that there is a muniment room at *Taymouth Castle,* and that there is a key to the room, which is in the possession of the trustees. But it does not appear that they have any power to enter the castle and to use that key for the purpose of searching. On the contrary, it is said in the case of the Respondents, and not denied, that the possessor of the estates has taken means pending the litigation to prevent the trustees from entering the room or dealing in any way with those documents. Therefore we are not in the same position as that in which we should have been had the application for a *subpœna duces tecum* been made while as yet it was uncertain what would be the case set up by those upon whom that subpœna would be served. Here their case has been stated; and it appears to me that your Lordships must deal with it just as if there had

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been a *subpœna duces tecum* in the first instance, and you were called upon to take some further steps in consequence of disobedience to that *subpœna duces tecum*. It appears to me that no case whatever of such disobedience has been made out against the Respondents. I think that, in substance, the Appellant's case entirely fails; so that I quite agree with what my noble and learned friend on the woolsack has proposed to your Lordships, namely, that this appeal should be dismissed with costs.

*Interlocutor affirmed, and appeal dismissed with costs.*

Solicitors for the Appellant: *Steele & Sons.*

Solicitors for the Respondents: *Loch & McLaurin; John Graham.*

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*July* 31.

WILLIAM PATRICK RALSTON SHEDDEN AND ANNABELLA JEAN SHEDDEN } APPELLANTS;

PATRICK AND THE ATTORNEY-GENERAL, *et al.* . . . . . } RESPONDENTS.

*Six Judgments against the Legitimacy of one Individual.*

Case in which a gentleman, the Appellant, *William Patrick Ralston Shedden*, born in *America*, but claiming by descent a Scotch estate, was, so far back as 1803, pronounced by the Court of Session *illegitimate*;—in which the sentence so pronounced was, in 1808, affirmed by the House of Lords;—in which an action brought to set aside the sentence of both tribunals was, in 1852, dismissed by the Court of Session with costs;—in which such dismissal was, in 1854, affirmed by the House of Lords with costs;—in which a Petition presented by the said Appellant and by his daughter, to have him declared not only legitimate, but also a natural-born subject of the Queen, was, by the Court for Divorce and Matrimonial Causes, in 1860, dismissed with costs;—and, finally, in which, upon appeal from the adjudication of the Court for Divorce and Matrimonial Causes, the House of Lords, on the 31st of July, 1869, affirmed it with costs (1).

*Evidence of Marriage* before *the Birth of Children.*

*Per* LORD CHELMSFORD:—The only question which the Court below had to determine was, whether there had been a marriage of the parents of the Appellant, *William Patrick Ralston Shedden*, prior to his birth. His claim

(1) The litigation still proceeds, see *infra*, p. 548.

to be declared legitimate was placed upon no other ground. For many years before the father's death, *Ann Wilson* was living with him, sitting at the head of his table, and acting in every respect as the mistress of the establishment, being visited by the respectable families in *New York*, and generally reputed to be his wife. Evidence was given by members and friends of the family of their being always reputed to be man and wife, and visited as such by respectable families in the neighbourhood. If the case of the Appellants had rested on this description of proof, without anything to oppose it, it would have been conclusive in favour of a prior marriage.

*Evidence of Marriage* after *the Birth of Children.*

*Per* LORD CHELMSFORD:—The presumption of a prior marriage arising from cohabitation and acknowledgment was completely rebutted by evidence on the other side of the strongest character. The Appellant relied originally on the marriage *after* the birth of children.

*Per* THE LORD CHANCELLOR:—If, according to the theory now set up, there had been a prior marriage, which was known to everybody, then there was not a shadow of ground for a second marriage. That second marriage, unexplained as it is, wholly cuts away the ground for any such prior marriage.

*Trial by Jury as of Right.*

*Per* LORD CHELMSFORD:—It was clearly in the discretion of the Judge Ordinary to decide whether the trial of the Appellants' Petition should be by a jury or before himself, either alone or with other Judges of the Court. And the Appellants had no right to insist upon having a jury.

*Per* THE LORD CHANCELLOR:—In the case of an heir-at-law who has been disinherited, he has, on the issue *devisavit vel non*, a right to a trial by jury. But in no other case is there such a right.

THE litigation in this case was commenced about seventy years ago, in order to ascertain whether the Appellant, *William Patrick Ralston Shedden*, was legitimate or illegitimate; whether he was an alien or a British subject; and whether his father, *William Shedden*, had had his domicil in *Scotland* or in *America*.

The facts were, shortly, that *William Shedden*, the father aforesaid, a Scotsman by birth and origin but an American by residence, a week before his death, in November, 1798, married Miss *Ann Wilson*, by whom he had had two children—a son (the Appellant *William Patrick Ralston Shedden*), and a daughter. The son, born in 1793, was in 1800 sent to *Scotland* for education. On the assumption that he was illegitimate, his cousin, *Robert Patrick*, claimed the family estate and took possession; but a suit was instituted in 1801 to displace *Patrick*, by shewing that the Appellant, *William Patrick Ralston Shedden*, was the lawful heir under the Scotch law of legitimation *per subsequens matrimonium*. Judg-

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ment to the contrary was pronounced by the Court of Session in 1803 (1); whereupon an appeal was presented to the House of Lords, and fully argued before Lord Chancellor *Eldon* and Lord *Redesdale*, who, on the 3rd of March, 1808, concurred in recommending that the interlocutor of the Court below should be affirmed (2).

On the 28th of February, 1848 (forty years after the judgment of the House of Lords) the Appellant *William Patrick Ralston Shedden* instituted a suit in the Court of Session, renewing the assertion of his legitimacy, and insisting that the decree of the Court of Session, and the Lords' judgment affirming it, should be rescinded and set aside, on the ground that both decisions had been procured by fraud and misrepresentation.

In this fresh proceeding the Appellant *William Patrick Ralston Shedden* asserted that his father and Miss *Wilson* had been recognised as standing towards each other in the relation of husband and wife *before* the birth of their son and daughter.

The Court of Session, on the report of Lord *Fullerton*, dismissed *William Patrick Ralston Shedden's* suit, with costs.

An appeal brought to the House of Lords came on for argument in March, 1854 (3), before Lord Chancellor *Cranworth*, Lord *Brougham*, and Lord *St. Leonards*. After a very full argument and much consideration, the House, in May, 1854, gave judgment against the Appellant *William Shedden* with costs (4). The main ground of this determination was, that the allegations of fraud

(1) The following is the heading of *Shedden* v. *Patrick*, as decided in 1803, by the Scotch Court:—"FOREIGN: One whose parents were afterwards married in a country where legitimation *per subsequens matrimonium* is not recognised, does not succeed to a landed estate in *Scotland ab intestato*, as a lawful child." Fac. Coll. 1 July, 1803, and 1 Macq. 536.

(2) There is no report of the decision of the House. The Appellant's printed case (signed *Ar. Fletcher, Henry Brougham*) insisted mainly: 1. That by the Scotch law children in the position of the Appellant are *ab initio legitimi, non legitimati.* 2. That the decision must be according to the *lex loci* where the estate claimed is situated. These were the chief arguments of the Appellant. The Respondent's printed case (signed *Saml. Romilly, M. Nolan*) urged 1. that the Appellant "could not succeed to any property by descent, or by personal representation, as he was born in *America*, and his parents were domiciled there. 2. That he was an alien.

(3) 1 Macq. 589.

(4) Ibid. 535.

were neither specific nor relevant. On the merits Lord Chancellor *Cranworth* said:—

> The Appellant's argument is, that his father, though resident in *America*, had his domicil in *Scotland*. I will assume that the Appellant has made out that for which he contends. But the question is, whether he is a natural-born subject of Her Majesty, or of the King at that time? He was an alien when born; and alienage attached upon him irreversibly.

The allegation of a marriage by reputation before the birth of the children was regarded by Lord *Cranworth*, Lord *Brougham*, and Lord *St. Leonards*, as in the last degree improbable (1). They pronounced no positive or definite opinion as to the question of domicil; but they recognised the doctrine then recently established in *Scotland* (by a majority of seven Judges against six) (2), that legitimation *per subsequens matrimonium* operates only from the time of the marriage, and not from the time of the birth; so that the Appellant *William Patrick Ralston Shedden* was not, when born, the son of a native British subject—but was *filius nullius*.

In August, 1858, an Act was passed (3) "to enable persons to establish their legitimacy and the marriage of their parents and others from whom they may be descended, and also to establish their right to be deemed natural-born subjects of the Queen."

The Act authorizes a suit to have the marriage of one's grandfather and grandmother declared to have been valid.

Relying on this enactment, the Appellant *William Patrick Ralston Shedden*, and his daughter Miss *Shedden*, on the 22nd of December, 1858, presented a Petition to the Court for Divorce and Matrimonial Causes, praying a declaration that *William Shedden* (father of the Appellant *William Patrick Ralston Shedden*) and *Ann Wilson* were lawfully married prior to the birth of the Appellant *William Patrick Ralston Shedden*, and of his sister *Jean Ralston Shedden*; and further praying a declaration that the Appellant *William Patrick Ralston Shedden* was the legitimate son and heir of his parents, and a natural-born subject of Her Majesty.

(1) Lord *Cranworth* thought that the alleged prior marriage by "cohabitation and acknowledgment was incredible, and absolutely irreconcilable, in point of fact, with all the rest of the case." 1 Macq. 615.

(2) The minority included the Presidents of the First and of the Second Division, and also Lord *Moncreiff*; the decision was in 1840.

(3) 21 & 22 Vict. c. 93, *The Legitimacy Declaration Act*.

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The Attorney-General, as required by the Act, was made a Respondent, and appeared along with the trustees and executors of *William Patrick*, deceased, also made Respondents.

The Court below (consisting of Sir *Cresswell Cresswell*, assisted by Mr. Justice *Wightman*, and Mr. Justice *Vaughan Williams*) after an argument which went over many days, decreed, on the 27th of November, 1860, without the aid of a jury, that "the elder Petitioner was not legitimate, and was not a natural-born subject; and condemned the Petitioners in costs" (1). A trial by jury was demanded by the Appellants, but refused.

On the appeal to the House of Lords, the printed case of the Appellants was signed by the Lord Advocate of *Scotland* (2), Sir *Fitzroy Kelly*, Sir *R. P. Collier*, Sir *Hugh Cairns*, and Mr. *Mathews*, Q.C.

The Solicitor-General (3) made several intermediate applications on their behalf.

The printed cases on behalf of the Respondents were signed by Mr. *Bourke*, for the Attorney-General; and by Mr. *Mellish*, Q.C., Mr. *Powell*, Q.C., and Mr. *Ashley*, for the other Respondents.

When the case was called, it became necessary for Miss *Shedden*, her counsel being unprepared, to address the House, which she did for twenty-three days. Her father, the Appellant *William Patrick Ralston Shedden*, followed her, and spoke for two days.

Without hearing the Respondents' counsel, the House, on the 30th of July, pronounced judgment; the Law Peers having delivered their opinions in the following terms:—

THE LORD CHANCELLOR (4):—

My Lords, we were engaged during many days in hearing the discussion of this case on the part of the Appellants, and at the close of the Appellants' case we thought it right to postpone the consideration of the matter until we had each of us had time fully to consider the enormous mass of documents which had been laid before us, with

(1) See 2 Sw. & Tr. 170, where the pleadings are set out.

(2) Mr. *Moncreiff*, now Lord Justice Clerk of *Scotland*.

(3) Sir *John D. Coleridge*.

(4) Lord *Hatherley*. The judgment is from Mr. *Gurney's* notes, which were revised and settled by the Lord Chancellor before going to print; as the litigation is not yet closed. See *infra*, p. 548.

such light as had been thrown upon them by the argument of the Appellants; which argument, on the part of Miss *Shedden*, was conducted with the greatest possible ability during the first three or four days of the discussion, when all, I think, was said that fairly could be said upon the subject; and although it was afterwards protracted to a most unreasonable length, yet still that very length, perhaps, has offered this one sole advantage (greatly, undoubtedly, to the prejudice of many other suitors at your Lordships' Bar), that we had the fullest and amplest time, even during the discussion, to consider the different propositions that were brought before us.

Now the appeal in this case is from two Orders of the Court for Divorce and Matrimonial Causes—the one being a decree by which it was declared in substance that the Appellants had failed to make out the case which they propounded to the Court, namely, a case in which they sought, under the Act of 1858, for a declaration with reference to the nationality and legitimacy of *William Patrick Ralston Shedden*. His daughter, Miss *Shedden*, appeared in the same suit as being a party interested in the declaration that was sought; every person so interested being, under the Act, entitled to appear. The other parties who are now Respondents before us were cited as being persons interested in the consideration of the question. The first decree declared against the claim of the Appellant; and the second proceeding, as to which there is an appeal, was a refusal on the part of the learned Judge who tried the case to direct a new trial.

Since that there has been put in a sort of supplementary application on the part of the Appellants to your Lordships, with reference to the custody of certain documents, which are alleged to be false documents, or documents which have been in some way or other tampered with.

Now with reference to the proceedings that have taken place before the Judge of the Court below, and which led to his decree, the complaint is this:—First, that the learned Judge ought to have tried the issue by a jury. Secondly, that the decision come to by the Judge, with the assistance of two other most learned and able Judges, Mr. Justice *Wightman* and Mr. Justice *Vaughan Williams*, was against evidence. Thirdly, that improper evidence was admitted. Fourthly, that evidence which was tendered on the part

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of the Appellants was improperly rejected. Then again, fifthly, that the Appellants were taken by surprise—that was part of the foundation of the application for a new trial; and, lastly, that new and material evidence has been discovered since the trial, upon which ground also the motion for a new trial was rested. As to the last two points, namely, the being taken by surprise, and the discovery of new evidence, there is really scarcely a question. The main questions we have to consider are, in the first instance, whether the decree of the Court was against the evidence then before it; whether the evidence then before it consisted of anything which ought not to have been received; and, lastly, whether there ought to have been other evidence before it which was tendered and rejected.

Now the case, after all that has been said, and after the enormous time that has been taken in the discussion, is reducible to the very simplest proposition, namely, whether or not the correspondence which took place (for that is the whole question) at the close of 1798, in the lifetime of *William Shedden*, in respect of whom the Appellant seeks to establish that he was his father, and married his mother, Miss *Wilson* — whether that correspondence, which took place just at the close of his life, be a genuine correspondence in the sense of its being a correspondence expressing the real intents, feelings, and convictions of the parties to that correspondence—a great part of it consisting of declarations which, if genuine declarations, are most important with reference to the decision of this matter—declarations of the family who were then engaged in that correspondence. And then, secondly, which is the main point undoubtedly in the whole case, whether or not one most important letter in the correspondence, namely, the letter of the 12th of November, 1798, said to be written by *William Shedden* himself, be genuine in a different sense, that is to say, be authentic, as being the letter of the person to whom it is attributed by the Respondent, or whether it be a forgery? If that letter be authentic, there is no doubt that the whole case of the Appellants fails; and therefore the whole case is brought to this, that we are bound to consider, and to consider deliberately, whether or not we are satisfied and convinced that the correspondence was a real correspondence, expressing the real opinions and feelings of the parties who entered

into it; or whether, according to the theory of the Appellants, it was a concocted correspondence, a correspondence in which all those who were engaged in it were playing their part, preparing a scheme in order to give effect and colour to an instrument which was afterwards, by one or other of them, forged, namely, the letter of the 12th of November, and therefore a correspondence which is, in itself, utterly unworthy of credit, and which, being displaced, other evidence could be let in which was given in reference to the alleged marriage of *William Shedden* with *Ann Wilson*.

Now the facts of the case up to that time are shortly these:—You have *William Shedden*, a gentleman possessing a small estate, which has been enormously magnified—as everything else has been in the imagination of the Appellants—a small estate of about £300 a year, enabling him to fill a place in society as a gentleman. And it appears that he sought to increase those not very ample means by engaging in commerce. He went as a very young man to *Virginia*, where he had relatives, with a view, no doubt, to ultimately engaging in some scheme of commerce. At that time, however, not being of age, he returned to *Scotland*, and he again went out after attaining his majority in 1770, forming at that time a house of business with a gentleman of the name of *Archibald M'Call*. He went to *Virginia*, at that time one of the colonies of *Great Britain*. He remained in *Virginia* until the outbreak of the American Revolution, which led to the ultimate separation of the *United States* from this country. In that state of things, Mr. *Shedden* seems undoubtedly to have taken part with the Royalists, and to have been a Royalist from that time down to the period of the separation by treaty in 1785. He appears to have been persecuted in *Virginia*, and subjected to some inconvenience for his Royalist opinions. Then he went from *Virginia* to *Bermuda*, partly, I suppose, in consequence of this persecution. In *Bermuda* he engaged in another business with Mr. *Goodrich* and Mr. *Robert Shedden*, junior, who was himself the son of *Robert Shedden* the elder (who carried on business in *London* under the name of *Shedden & Goodrich*). This *Robert Shedden*, junior, engaged with *Goodrich* and *William Shedden* in a firm at *Bermuda* for the purpose of dealing as prize agents, and in matters of a similar description, under the firm of *William Shedden & Co.* This concern seems

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to have gone on until about the year 1783, when *Robert Shedden* appears to have been disposed to break up the concern of *William Shedden & Co.*, or, at all events, to have taken steps towards its being broken up; and a new firm was formed to carry on business at *New York*, under the name of "*Shedden, Patrick, & Co.*," in which *Robert Shedden*, junior, took a part, and in which Mr. *William Patrick*, of *Virginia*, the cousin of Mr. *William Shedden*, and a cousin more or less remote of *Robert Shedden*, was to have a share, he being introduced into it principally by the good will of his cousin Mr. *Robert Shedden*, who seemed disposed to assist him by furnishing him with capital for that purpose. The capital of the new firm of *Shedden, Patrick, & Co.* was divided into three shares; two-fifths were held by *Robert Shedden*, two-fifths by *William Shedden*, the person about whom our inquiry is now being made, and one-fifth by *William Patrick*, of *Virginia*.

This concern being so constituted, I do not go through all the various letters which have been introduced from the very earliest period in the history of Mr. *William Shedden*, because I am at once willing to acknowledge, not only for the sake of argument, but, as it appears to me, as a matter of fact fairly appearing upon the letters and correspondence, that Mr. *Shedden* conducted himself (as far, at all events, as is shewn upon the face of that correspondence) in a kindly and generous manner towards his relations. He carried on a friendly and kindly correspondence with them; and he seems also to have been disposed to help one of his nephews, one *John Patrick*, about whom much more is afterwards said, who went out to him in 1791, in some capacity or other, with the intention, I suppose, of being eventually introduced into the business, but at first in the capacity of clerk. Mr. *Shedden* seems not only to have been disposed kindly towards his relations, but also to have carried on his business in a way which gained great approbation amongst those to whom he was known, and to have filled the place of a person of some degree of weight and consideration in *New York*.

That being so, and as I really do not think it right to pause for the purpose of entering into the enormous investigation of correspondence to which we have been invited by Miss *Shedden*, having given my general view and opinion of the bearing of the letters upon the character of the parties, I shall come at once to that

period which was very near to the death of *William Shedden*, namely, the year 1798, and about the month of September in that year. Shortly before that time *Robert Shedden* the younger went out to *New York*, and in the month of September important transactions took place with reference to a bond, about which much has been said in the progress of this inquiry. Having, however, reached this point, the point, namely, where serious controversy begins, I will pause for one moment to consider the line of argument of the Appellants, principally, that is, of Miss *Shedden*, upon whom has fallen undoubtedly the main burthen of the argument. The course which the Appellants have thought it right to take in order to obviate the necessary inference which must be drawn from the correspondence, if it be genuine and authentic, if this:—They allege that *William Shedden* was a man of model character, a man of exemplary honesty, integrity, and propriety, and that *John Patrick*, who went out to him in the capacity of clerk, was a man of a mean and low disposition—a person capable of any degree of dishonesty. That is said to be proved by some circumstances which occurred anterior to *William Shedden's* death, and it is said to be proved still more, according to some of the evidence, by some matters which took place after the death of *William Shedden*. It is said that while these business arrangements were going on in *America*, what was taking place in *Scotland* was this:—*William Shedden*, being out in *America*, had in the first instance appointed his brother-in-law, Mr. *John Patrick* the elder, who had married *Mary Ann Shedden* his sister, together with two other gentlemen of the names of *Fullarton* and *M'Lellan*, as factors to manage his property and estate, *John Patrick* the elder taking the principal part of the management. A good deal was said in the part of the inquiry which I am now upon about the intention expressed by *William Shedden* from time to time to return to *Scotland*, shewing that he had not the intention of becoming a domiciled American. But that is a point which I will reserve for the present. Mr. *John Patrick* the elder, who was acting as agent for Mr. *William Shedden* and for the brother-in-law of *William Shedden*, had three sons. He had, first, his eldest son *Robert Patrick*, afterwards called Doctor *Robert Patrick*, who served in the navy as a medical officer; then he had *William Patrick*, about whom a great deal

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has been said in the course of this inquiry, who became a writer to the signet, and *John Patrick*, who went out in the manner I have described in 1791, and joined his uncle *William Shedden*, and assisted him in some way in carrying on his business. *John Patrick* the elder died some time before 1798. On *John Patrick* the elder's death, *William Patrick* is appointed to act as factor of *William Shedden*, as his father *John* had acted before him. He was to manage the estate, and he kept up a considerable correspondence with *William Shedden* with respect to the management of the estate. During all that time there was also a mass of correspondence going on between the brothers themselves. We have not got all the letters of both brothers, but we have numerous letters of *John Patrick*, who resided with his uncle in *Virginia*.

The first observation I shall make upon the correspondence, of which we have a great mass, is this, that in that correspondence you find a great deal of family gossip. I have noticed several passages which, however, I do not think it necessary now to cite, because it would only improperly lengthen the address I am making to your Lordships. It is enough for me to say that you find over and over again such things as this, that *George Brown* is going to marry So-and-So, and that somebody else is thinking of marrying somebody else, and so on. There is a great deal of family gossip going on among the parties. I mention this as a matter of some little importance, because in all these letters there is not one word said from beginning to end, with the exception of what I will presently notice as belonging to another part of the case (namely, a letter of Dr. *Robert Patrick*, which has been produced with a view to a motion for a new trial), with that exception there is not one single word said from which it could be surmised, or in any way supposed, that Mr. *William Shedden* was married, or that he had any child whatever. There is an expression in Dr. *Robert Patrick's* letter, which I will afterwards refer to, where he says, "I always thought that *William* would give those —— children" (which, I suppose, means his bastard children) "some of his property." I will say a word upon that before I conclude—but with that exception there is not one word written by any of the members of the family about *William Shedden* having any wife or child at all.

But a great deal has been said by Miss *Shedden* in her argument about the difficulty which she is put to, and suspicions are thrown out—in fact, everything is suspected that comes from the adverse side. She throws out that *William Patrick* got some of her aunt's letters, some of the *Fullartons'* letters—that he had an insatiable demand for documents. The Appellants charge *William Patrick* with looking over this lady's papers, and sorting her letters, and other things of that kind. But as a counterbalance to such remarks, there is a most remarkable circumstance as to the facilities which have existed on the part of the Appellants of obtaining information. In the first place *William Patrick* seems to have, in a most extraordinary manner to my mind, preserved an enormous mass of correspondence—correspondence such as most men destroy at some period or other in the course of their lives—long before they reach fifty or sixty years—he preserved an enormous quantity, which has been produced. But, besides that, in the year 1849 Mr. *Shedden*, the Appellant, goes to *America*, and there he finds two large boxes of his father's papers—one in Mr. *Farquhar's*, and another in another gentleman's custody—some connection, I think, of the *Hosacks*—he finds those two boxes of papers, with which *William Patrick* would have nothing to do.

Miss *Shedden*:—*John Patrick* himself says that they came out of his own possession—that they had been in the possession of *William Patrick* of *Virginia*.

THE LORD CHANCELLOR:—Miss *Shedden*, I cannot allow this interruption. I believe I am pretty accurate in stating these matters, and if I should fail upon any minute point of no real importance it would not be wonderful, considering that there is such an enormous mass of documents.

Miss *Shedden*:—The papers were ransacked by the *Patricks* first.

THE LORD CHANCELLOR:—Mr. *Shedden* had an opportunity of seeing those papers, and he describes it as being one of the most wonderful and most miraculous things that he had that opportunity. Further than that, Mr. *Shedden* had another most singular oppor-

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tunity, he had the opportunity of seeing, through the medium of Mr. *Van Hook* (the administrator of *John Patrick* the younger), the whole mass of correspondence which had passed between *William Patrick* and his brother *John Patrick*, of the most confidential character. This mass of correspondence was all produced to him—nothing having been removed by anybody else—on the part of *William Patrick*. What had been removed by Miss *Ralston* we cannot tell, but Miss *Ralston* confesses to having suggested the destruction of one document, and Mr. *Van Hook* confesses to having destroyed that document at her request. Whatever else may have been destroyed we cannot tell, but this is certain, that *William Patrick*——

Miss *Shedden*:—*William Patrick* ordered the destruction of the whole of those.

THE LORD CHANCELLOR:—Miss *Shedden*, pray do not interrupt me. I must order your removal if you do. It may be convenient to you to confuse me if you can. I shall not be confused by your interruptions, but it is most improper and most indecent. *William Patrick* had asked for these documents, and Mr. *Van Hook* very properly refused to give them to him. Mr. *Van Hook* behaved extremely well. I have no complaint to make of Mr. *Van Hook* beyond this. I think he was wrong in allowing that document to be destroyed which Miss *Ralston* wished to have destroyed—with that exception he seems to have acted most properly. He summoned Mr. *William Patrick's* agent to see the examination of the papers, and he did not deliver any of the papers or any copies of the papers to Mr. *Shedden* without having given ample opportunity to Mr. *William Patrick's* agent to be present at the examination. But, again, what Mr. *Van Hook* says, is this—it is no evidence in itself, but it is only just to *William Patrick* to mention it—that he has reason to believe that some other person did tamper with papers, but not *William Patrick*. Therefore, Mr. *Shedden* has had an opportunity in this case of seeing all these most private letters between the parties. Everything which they had a right to has been brought out that could be ferretted out with reference to *William Patrick's* correspondence, and the result is, that no men-

tion whatever is made in this correspondence of any existing wife or any existing children until we come down to that particular epoch of 1798. These circumstances are extremely strong to shew your Lordships that although there was this correspondence carried on between Mr. *William Shedden* and his nephews in the most friendly tone, no suggestion is made of his having ever had a wife or child.

In this state of things we are brought to the circumstances attending his last illness. Here I must be a little more particular —here I must turn to the letters, and I am sorry to say I have been put to very great difficulty and inconvenience with regard to these letters—because in a great number of instances where a passage comes which is unfavourable to the Appellants, they leave a blank in their copy of the letter as set out in the appendix. They merely say (in a parenthesis) "Here something about a marriage," or something of that kind; so that I have been put to continual inconvenience by having to turn from one volume to the other. But I have endeavoured to go through the whole as well as I can. I believe I have read every single letter in the correspondence since the case was heard, both that which was evidence and that which was not evidence, for I really thought it best to read them all as far as the Appellants are concerned—and having read the whole of the evidence, I certainly have arrived at the clearest possible conviction that the correspondence is genuine and authentic, and that, as was well said by one of the learned Judges, no candid or unprejudiced mind could possibly come to any other conclusion whatever. But now I ought to mention another thing before I return to *Robert Shedden's* visit to *New York*. There is a letter which Miss *Shedden* made a great point of, and I think justly so. With reference to the character of the parties she endeavoured to lay open to us, very ingeniously, the character on the one hand of this estimable man, Mr. *William Shedden*, a man held in respect by all who knew him, and the character of the man he was dealing with—namely, *John Patrick*, his nephew. I must say that, endeavouring as well as I can most justly to balance these arguments, what I see of *John Patrick* in the correspondence is not prepossessing in any way. In the first place, his style of letter writing does not indicate a man of cul-

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tivated mind, but it seems framed upon something like *The Complete Letter Writer*. It is florid and bombastic, and in a tone which is anything but agreeable. There is one letter of that kind that I will just specify. I do not remember its date. He has a quarrel with *William Shedden*, and he thereupon writes a high flown letter complaining of being treated with want of confidence. And there was another letter which Miss *Shedden* justly commented on, and which I think shewed the two men in the light in which she wished to shew them, namely, *William Shedden* as a man of much higher honour than *John Patrick*. It is a letter in which *John Shedden* writing to *George Shedden* says, "You gave me some information which evidently you wished to have conveyed to Mr. *William Shedden*. He (*John Patrick*) did not know how to convey it in a manner likely to be received in a favourable way. And he says, 'I would have tried the plan of dropping your letter for Mr. *William Shedden* to see it, but I have tried that once before, and I found the dropped letter returned on my desk. Mr. *Shedden* had not opened it.'" Miss *Shedden* very properly says the man who tried such a scheme was not a man of very high mind—and it shewed the other to be a man of high character, that when he found a letter addressed to another person he did not open it, but returned it to the person to whom he thought it belonged. I have omitted to notice all the little points suggested by Miss *Shedden*, because I cannot possibly do so. It is impossible to take all these minute matters point by point, and to go through all the extensive mosaic of argument which was pieced together from them. We must go to the broad features of the case.

Then, on the 1st of September, 1798 (and a good deal turns upon the *bona fides* of this) a bond, beyond all question, was given to the firm of *Robert Shedden & Sons* in *London* (*Shedden & Goodrich* of *London* had become *Shedden & Sons* by that time) in respect of the sum of £4000 which was owing by *William Shedden* at that time to the firm of *Shedden & Sons*, in this fashion, not that *William Shedden* was himself alone answerable, but the condition of the bond recites this:—

Whereas, the late firm of *Shedden, Patrick, & Co.*, whereof the within mentioned *Robert Shedden* was two-fifths, the within mentioned *William Shedden* was two-fifths, and *William Patrick*, now of *Smithfield*, in *Virginia*, was one-fifth

concerned, are indebted unto *Robert* and *George Shedden*, of the City of *London*, merchants, trading under the firm of *Robert Shedden & Sons*, as within mentioned, upwards of £10,000 British sterling, the within bond for £4000 British sterling and interest, is hereby declared to be given by me in consideration of and as security for my proportion of said debt.

And afterwards we find that after *William Shedden* had died certain arrangements were made for its being paid.

Now, a great deal, no doubt, does depend upon this: and therefore Miss *Shedden* has laboured in the most extraordinary manner to prove this to be a forgery, like everything else that comes athwart the case of the Appellants; but the bond is proved in the most distinct manner by——

Miss *Shedden*:—By the son of the bondholder.

THE LORD CHANCELLOR:—Really, it is impossible to go on with these interruptions. It is proved by the son, who proves the handwriting of his own father. [Miss *Shedden* corrects this: "He was nephew."] The witness to the bond is his own uncle, then, and he proves the handwriting, and that is the way in which all instruments are attested and proved.

Miss *Shedden*:—But his uncle was one of the holders of the bond.

LORD CHELMSFORD:—I really must request that something may be done to stop these interruptions.

THE LORD CHANCELLOR:—If you cannot avoid interrupting in this way, Miss *Shedden*, we must insist upon your removal.

Miss *Shedden*:—Very well, I will not do so again. I only pray your Lordships that it may not go out to the public that it was otherwise than a bond given to the firm of *Robert Shedden & Sons*.

THE LORD CHANCELLOR:—Miss *Shedden*, I shall be obliged to order your removal. It is nonsense to talk about these matters going out to the public. The public has nothing to do with this case beyond seeing that justice is administered. The public do not care about the details of this case any more than any other case. It is one of those hallucinations which, unfortunately, besets

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the minds of Appellants here, that theirs is a case in which all the world is interested. The public is interested in seeing that justice is done; but beyond that it is not interested in the slightest degree.

Now, this bond is a bond which, undoubtedly, is given to the firm of *Robert Shedden & Sons*. *Robert Shedden*, junior, is one of the firm of *Robert Shedden & Sons*, and, therefore, is one of the partners. He is also a witness to the bond. It is against his own interest, however, to witness it, because the condition of the bond recites that the *New York* firm, in which he was also a partner, is indebted to the same extent as the man who had given the bond.

Miss *Shedden*:—It is precisely the other way. It is *Robert Shedden*, junior, who purports to attest the bond.

THE LORD CHANCELLOR:—It was against the interest of his firm in *America*, and thus I thought it was against his own interest.

Miss *Shedden*:—It was in his own interest and his father's. He attested his own bond, because he was a partner in the firm of *Robert Shedden & Sons*. I thank God, before Heaven, that the truth has come out. He witnessed his own bond.

THE LORD CHANCELLOR:—He was a partner in the firm to which the bond is given.

Miss *Shedden*:—I thank your Lordship for the admission.

THE LORD CHANCELLOR:—His handwriting is proved to that attestation, and he was also a partner in the *New York* firm, which is recited to be indebted to the *London* firm.

Miss *Shedden*:—His writing is proved by the grandson of the bondholder.

THE LORD CHANCELLOR:—Miss *Shedden*, I do assure you most seriously that I must give orders for your removal if you interrupt me. I shall not allow you to interrupt, unless you are asked so to do. Now, this bond being proved most clearly and distinctly, as to the handwriting of the witness, which is the only mode in which bonds are proved, there were a variety of attempts, some of

them of a character which I think exceedingly improper, to get from this witness to the bond in after-life some acknowledgment that he had nothing to do with witnessing this bond, although he had attested it. But another attempt was made to shew that he could not have attested this bond on the 1st of September, because on the 1st of September he had left *New York*, for the purpose of going to *New Jersey*, in consequence of fever prevailing at *New York;* and, therefore, the attestation being dated on the 1st of September, it could not possibly have been executed on that day. Now, in the correspondence which took place, let us see how that stands. He writes on the 4th of September.

Miss *Shedden* :—Your Lordship refused to allow that letter to be produced. You said you would not allow it to be produced at the Bar of this House because it had not been produced in the Court below. I said that if that letter were produced it would have disproved that at once; I challenged them to produce it.

THE LORD CHANCELLOR :—There is another letter of the 11th of December, 1798, from *Robert Shedden*, junior, to his father, dated from *New York*, in which he writes: "My dear Father." I desire to observe that in reading this letter I do not read it to prove anything that is there stated beyond the point for the sake of which I refer to it. Of course it would not prove that there was any money owing, but when the question is raised whether it is possible that the writer was at *New York* on the 1st of September, the day the bond bears date, and which would be assumed to be the real date, inasmuch as everything is assumed that is on the face of a bond unless the contrary is proved; in this case it is important to read it with reference to that alleged impossibility :—

I wrote *George* on the 16th ult., copy whereof you have enclosed. On the day after, I received a letter from *J. Patrick*, of the 8th of November, informing me of the sudden change in Mr. *William Shedden's* health, and that in the course of eighteen hours his disorder had got to such a height, that every succeeding hour was expected to be his last; I therefore left *Norfolk* immediately, that is the first fair wind, and crossed the *Chesapeake* in six hours, got to *Philadelphia* on the seventh day, where I was very sorry to learn that he had expired on the 13th inst., which I have to regret much, as part of your orders were not complied with regarding the application for an heritable bond: however the simple bond of this country I have for £4000 sterling, payable the 3rd of September, 1799, which, I understand from the first lawyer, his landed property is liable for.

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Of course I do not read this letter to shew that the property is liable, or anything of the kind. He then accuses *William Shedden* in a manner which I do not read, because I have nothing to do with those accusations. He says:—

> I think it fortunate, from what has appeared since his death, that I got the bond at all, for he was a scoundrel. I have only to thank the fever for it, as when I came to the point on the 3rd of September, although he had promised me the Saturday before, still he was unwilling to execute it, and I was a long time endeavouring to get it finished, and actually told him I was determined, let the consequence be what it would, not to quit *New York* till I got the bond.

Miss *Shedden*:—I would only ask permission to state that that is dated a whole month after my grandfather was in the grave.

THE LORD CHANCELLOR:—I am quite aware of all that, I am not dealing with any of the facts, beyond the fact that on the 3rd of September that which was promised on the 1st of September was done. This is all said in the year 1798, and then it is supposed, like everything else in this case, that it is an ingenious mode of anticipating the possible results of law suits and all possible difficulties, by this letter, written at this time, in the most perfect simplicity——

Miss *Shedden*:—No, indeed, it is only a copy of the letter.

THE LORD CHANCELLOR:—I must order your removal if you interfere once more—the officer must take you out forthwith—I cannot bear such intolerable interruption. Now, I say, so far from there being any improbability or impossibility with reference to this bond, it is all simply and naturally explained, as everything is explained in the course of this correspondence, to anyone who takes the pains to read it simply as it stands, and does not read it with that extraordinary view which is taken by the Appellants at every stage of this case.

Therefore we have at this period in 1798, shortly before *William Shedden's* death, this bond, which is of the very greatest importance, as shewing an acknowledgment of debt to the *London* firm to the extent of £10,000, and that given apparently without any demur or any difficulty, beyond the dislike to commit himself to the execution of the bond.

Then the next thing which happens is this, we get to the correspondence of November. That correspondence of November is, of course, of the greatest possible importance; and, wholly irrespective of the testator's letter of the 12th of November, it appears to me that that correspondence, even if that letter had not existed, would have been fatal to the claim of the Appellants, namely, the claim of the male Appellant to be the legitimate child of his father, in consequence of some previous marriage which had taken place with *Ann Wilson*. The letter of the 9th of November is the first of the important letters of *John Patrick*. On the 9th of November he writes to *William Patrick* thus:—

Dear *William*,—I wrote you some time ago, *viâ London*, informing you of the melancholy state of this city,

and so on.

I have now to inform you that our friend Mr. *William Shedden's* disorder has at last arrived at a crisis. He is at this moment in the most advanced stage of an unconquerable consumption, and all the weakness of mortality before his eyes. Every revolving hour—

this is part of his odious style—

every revolving hour threatens a dissolution to his existence; his fate is fixed—he must die—he cannot live; but this is not all: he has, from considerations which he conceived moral, natural, legal, and proper, at the moment when eternity was staring him in the face, united himself in matrimony to the woman who has for many years lived with him in a very different situation.

Now, my Lords, I should have been inclined to say that this extravagant, stilted style might have created suspicion if it had not been for the previous letters I have referred to—letters which do not at all predispose me in his favour either as a man of education or as a man of straightforwardness of character; but those letters are just as stilted and just as preposterous as this letter is. He says:—

When eternity was staring him in the face he united himself in matrimony to the woman who has for many years lived with him in a very different situation. His object in this proceeding was to rescue from a state of bastardy, and introduce into the world, with all the privileges appertaining to those who are born under the influence of the law, two infant children, one a girl of about six years old, the other a boy of about five. The ceremony took place only on the 7th instant; it was to him a hard struggle, but the considerations above mentioned preponderated. I, of course, was not consulted; but he communicated the whole to me after it

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had taken place, with his motives. It was out of my power to interfere or prevent it; nor was it my wish. I have always had a pride in acting in things of that sort with a spirit of independence and propriety; nor did I ever interfere. In addition to that instrument, he has likewise executed his last will and testament, the substance of which I am unable to communicate at present; but you may, of course, guess nearly the contents.

Now a great deal of comment was made upon the fact of this person saying that he was not likely to be consulted at all. We have the fact that he was made an executor. Of course a man whom you make executor you are not unlikely to consult. Again, Miss *Shedden* remarked that he says: "In addition to that instrument," yet he does not mention any instrument before that. It is not very safe to reason upon a man's language who writes in this ridiculous and stilted style. Possibly he might call the certificate of the marriage an "instrument." He seems to say that the object of *William Shedden* was to rescue the children from a state of bastardy, in which case I suppose he would require a certificate of the fact of the marriage on the part of the clergyman. However that may be, I could not build upon these words the supposition of some suppressed and missing instrument, of which we have no trace except in the imagination of the Appellant. He says:—

On his death-bed (which it will doubtless prove) he communicated to me things that have been hid from the world—facts that would excite surprise. He likewise requested me to accept of the office of executor in conjunction with two others who are but little connected, to which I consented, being unwilling to refuse this last request, although it will undoubtedly entail on me a world of toil, trouble, and difficulty, and, besides, place me in a situation that may prove unpleasant and delicate: but the thing is done. Besides the two children mentioned, he has one other, a girl of about twelve years old, by another woman who is long dead—his very image, but who can reap no benefit from the measures adopted, being considered in the eye of the law a bastard. The other two children, though charming (1) infants, have not the same resemblance to him, I have further to add, in the most perfect confidence, that in my opinion the state of things will be such as to render a disposal of his property necessary, in order to liquidate the claims that I apprehend will come against it.

Then comes a passage which he marks with asterisks, and which he begs may not be communicated, intimating that the property would disappoint them, because he would be found to be in debt. There I will pause one moment, not because *John Patrick's* saying so was any proof that he was in debt, but when Miss *Shedden* saw

(1) Much stress was laid on the word "charming" used in this letter.

in her imagination vast amounts of wealth transmitted to *Shedden & Goodrich* in *London* for prize-money and other things, and when her father afterwards soared to the amount of one million sterling, of which he says he is deprived, it is as well to notice that the Appellants themselves give us the balance of money at the bankers—this enormously wealthy merchant left at his bankers about £250 sterling.

Miss *Shedden*:—If you look below in the same page, you will see that they were indebted to him.

THE LORD CHANCELLOR:—I am speaking of the balance at his bankers. The balance at his bankers was £1000, and odd pounds in dollars, as stated by yourselves.

Miss *Shedden*:—On the same page there is 30,000 dollars.

THE LORD CHANCELLOR:—Then the letter goes on about the legal claims, and so on. This letter, I must say, is a natural letter for such a man to write, remembering he was a man who was in the habit of writing in such a ridiculous style. He says:—

I would act with strict propriety; nor would I swerve one degree from that justice that devolves as a duty on every honest man; but I would carefully watch over those rights that become our inheritance, in common with the rest of mankind. These are my ideas, and I well know that yours will fully co-operate.

Then there is a part of the letter referring to the condition of his brother. He says:—

This being the case (of which I will in due time communicate more), and as we have claims, and they from natural right are certainly entitled to a priority, I think, in justice to ourselves, they ought not to be overlooked, and on you, as representative of the family, the guardianship of this right will devolve—I mean the dowry left to our mother, with interest, the interest on the advances by our father during the war, the commission for his agency in accepting and paying bills, and likewise as factor for the estate on the rents. I have interests of my own to watch over, and I have likewise those in opposition to them as an executor to promote. These must be reconciled as much as the nature of the thing will admit; and the sacred duties devolving on me will be fulfilled, as far as I am able, with justice and a regard to truth and rectitude. Yours is likewise extremely so, as agent for his heirs, and as representative of those who have claims that counteract them; but you must reconcile them to the best of your ability, holding in view the sacred and unerring principle of truth and justice. This is a situation we never could have contemplated; but it is a part of that thorny path that we must all encounter through life, and we must meet it with a fortitude proportioned to its magnitude.

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Now I only say that that man writes in the same ridiculous style in which he wrote in his previous letters when he quarrelled with his uncle and patron. It is very absurd and very ridiculous, but I see nothing in that to render it probable that the letter was otherwise than genuine in the sense of its expressing correctly the narrative of the events there mentioned. It shews the consciousness which every man must feel of the difficulty that he would be placed in with reference to a marriage at the last moment entered into with the view to legitimate children. Assuming the writer to be honest (and we are not to assume him to be dishonest; that has to be proved; I do not see anything in the letter which necessarily leads to such an inference), it seems to me to be a simple narrative of what actually took place. He is borne out by all the extrinsic facts. The father of the children had died; he had married their mother on his deathbed; and he had appointed the writer of the letter, and the other persons there mentioned, his executors.

Then comes the postscript, dated "Evening of 9th November," in which he says, "But amidst this gloom," Miss *Shedden*, no doubt, would wish me to read this (though I have no doubt, as I have stated, that her grandfather had many high qualities of mind):—

> But amidst this gloom, I have inexpressible pleasure in adding that he bears his situation, which is as trying a one as can possibly fall to the lot of human nature, with that greatness of soul, and with a composure, recollection, and resignation, that extracts the greatest reverence and admiration from all who have an opportunity of approaching him. Indeed, he shines under the shade of death greater, if possible, than when in the sunshine of prosperity. He has a heart pure and untainted; his memory with me will always be held in the most reverential remembrance. Oh, could I but imitate his virtues, while I could divest myself of those foibles that have unfortunately thrown a momentary shade over a character that would otherwise have been unsullied, and a memory that would have defied the shafts of malice; but such perfections are not to be met with in this sublunary world. He is reconciled to his fate, has made his peace with his Maker, resigns himself to his bosom, and dies a man and a Christian.

Now considering that this is the letter of a man shewn by his other letters to be a man of imperfect education, and with a highly-stilted manner of writing, I see nothing at all unnatural in his writing exactly in this way. Then comes another postscript of November the 11th, which Miss *Shedden* makes a great stir about,

but as to which it appears to me to be wholly immaterial to the question whether it was written on a separate sheet or not, or whether it was sent with this letter or not. I pass on to the only passage which appears to me important:—

> He has two important letters to write, and he dies contented. One is to you respecting his children, &c.

That, no doubt, is important. That is said to be all a contrivance and scheme to foist in a forged letter. He goes on:—

> The boy is to be sent to *Scotland*. I will be glad if you will keep that part of my letter to yourself which is comprehended between the mark ×.

Now, your Lordships will observe that the letter of the 9th had that mark of asterisks to one passage, and therefore this, which bears the date of the 11th, would seem to be a genuine postscript to the letter of the 9th. This postscript, about which so much has been said, refers to that letter of the 9th, and to that very mark, and it can refer to nothing else.

Then comes another letter, which is also, no doubt, of importance, a letter from *John Patrick* to *Robert Shedden*, of *London*. After saying that Mr. *Shedden* is approaching his end, he talks about his behaving like a "good Christian," and so on (I need not read that again), and then he says:—

> He acknowledged himself guilty of an error, the only one in his life, an unfortunate propensity, which you well know; it led him to his ruin. It forced him (on the 7th instant) at the moment when death was before his eyes, to an alternative which he could never have contemplated, an union with the woman that had long been with him in a different situation. His motives in this proceeding were pure; they were dictated by a feeling heart; he conceived it a duty, a moral, a legal, and a natural obligation to rescue from a state of bastardy, and introduce into the world, with all the privileges common to the rest of mankind, two infant children. It was a hard struggle, but the considerations above mentioned preponderated. He has executed another instrument—a last will and testament. He has appointed three executors, of whom I am one. It was an office I would rather have declined, but it was a last request, and I could not deny it.

It is a curious thing that he speaks of his executing "another instrument" immediately after the marriage here, as he did before. I can only consider that he conceived the certificate of marriage to be an "instrument;" no doubt it is an odd expression, but

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it is not one from which we can infer that there was something else concealed. Then at the end of the letter he says:—

> I shall soon have occasion to write to you again. Perhaps you will excuse this hasty communication.

Here, therefore, we have two letters which do not appear to me to bear the slightest mark of there being anything fictitious in them. As to his writing to Mr. *William Patrick*, he was the most natural person for him to write to, when Mr. *William Shedden* was about to entrust him with the care of his only boy, and when he had been his factor.

Now I pass over, for the moment, the letter of the 12th of November, and I come next to the letter of *John Patrick* to *Robert Shedden*, of *London*, dated *New York*, November 17th. He there only says: "The boy *William* is directed to be sent to *Scotland*;" but, before that, he speaks of the will which had been executed on the 7th, no doubt. Then there is another letter, dated *New York*, November the 18th, from *John Patrick* to *William Patrick*, telling him of the death of Mr. *William Shedden* on the 13th. There is a passage which I will beg your Lordships to notice. He says:—

> The boy *William* is left under your guardianship, and is directed to be sent to *Scotland* to receive a genteel education, and to be put to such profession as may appear best to suit his genius. . . . He has appropriated a fund, say £400 to £500 sterling

Mark that, because it is a matter of some importance. There is nothing in this about a definite amount of £417 which appears in the letter of the 12th of November, and nowhere else, but

> £400 to £500 sterling for those purposes to be at your disposal, and independent of his executors. I shall write you again in a few days by some of the *Greenock* ships. On the day which proved Mr. *Shedden's* last, yours of 18th September came to hand, as did that to him, but he was unable to read it.

I pass over altogether the letter of the 7th of December acknowledging the receipt of an account current, because it was after the testator's death. Then we have a letter from Mr. *William Patrick*, of *Virginia*, to Miss *Jean Shedden*, of *Beith*—he was a relation, too. Now the Appellants say that *William Patrick*, at or after the death of *William Shedden*, formed the plan of plundering his partner, and that was the object of his joining in this scheme with the other *Patricks*. It is a strange notion undoubtedly, but every-

body is to be brought in somehow or other as taking part in this conspiracy. *William Patrick*, of *Virginia*, then writes thus to this lady:—

I wrote you from this in June, since which I have not heard from you. I left *Virginia* 20th last month, at which time I left Mrs. *Patrick* and our little girl in good health. Before I got here Mr. *William Shedden* had paid the debt of nature; it had been long expected. He gradually declined to the very last; he went off on the 13th of last month very much regretted. A few days before his death he married the woman that had lived with him many years, by whom he has two children, a boy and girl, besides which he has another daughter about thirteen years of age. Whatever property he has left goes to his children; the marriage took place to throw off the stigma from the children.

This man writes natural English. "I don't believe it was from much regard to the woman." This is a natural letter, certainly, although wanting in expression of feeling. This gentleman does not, in fact, seem to have had highly refined feelings, for some of the expressions in his letter are very coarse. However, at all events, he had not the affectation of exhibiting magniloquent language, but in saying what he has to say he simply tells the tale of all that, to his knowledge, has taken place. This *William Patrick*, of *Virginia*, then also mentions the fact of the death-bed marriage as being intended to remove the stigma from the children.

Then follow several other letters from about this time, through February, 1799, to the end of the year 1799. I do not intend to go through those other letters, because they do not bear directly upon the important and turning point of the case.

But I will now turn back to the letter of *William Shedden* of the 12th of November, upon the authenticity of which much necessarily turns. I should say that in what I have read of *William Patrick's* letter and *John Patrick's* letter, you have declarations by relations who were perfectly competent to know all that had taken place. And it seems to me that, barring the extravagant diction of *John Patrick*, which I have commented upon, the facts are related in a manner that is extremely natural and simple. Now this important letter of *William Shedden* of the 12th of November is as follows. It is headed "Duplicate," "Original per ship *Fanny, viâ Greenock, New York*, 12th November, '98."

My very dear Nephew,—My long and painful illness must apologize for my long silence. I am now going to quit this world. I have married Miss *Ann*

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*Wilson*, which is approved of by my friends here, and which restores her, and two fine children I have by her, to honour and credit. I have settled all my affairs, and appointed executors here, who will correspond with you. One of my children is a boy, named *William Patrick Shedden;* they are charming children, he in particular. I have ordered my executors to send him to you. I now remit first of *Griffiths & Walronds'* exchange on Messrs. *Thomas Daniel & Co.*

He gives the exact particulars of those three bills, which amount together (and it is important to observe this), to £417 15*s.* 8*d.* sterling. Then he says:—

and I desire that such further sum or sums of money may be appropriated for the purpose of maintaining and educating him genteelly, and according to his talents and inclination, not exceeding £500 sterling, without the consent of my executors, of whom you are to be totally independent in this business. I can only add, that I remain, till death, dear *William*, your affectionate uncle, *William Shedden.*

Now, I say that, to my mind, *John Patrick* could not have written such a letter. It is perfectly impossible, if you compare its simplicity with his ridiculous, inflated, and stilted style. That letter is one which, to my mind, could not possibly have been written by him. But why are we to imagine such a thing? We are asked to suppose that this man is possessed of such cleverness that he is both to prepare this letter of the 12th of November, and to insert in it that word which was pointed out and commented upon by the learned Judge of the Divorce Court, as being the very thing upon which almost the whole turns, "to *restore* her to credit." That he should have hit upon that expression just in this alleged forgery is, to my mind, most improbable.

Now, the question turning largely upon this letter, I intend to confine the observations which I am compelled to make in this case to the question of fact—Whether that letter be a genuine letter, in the sense of authenticity, or not? In the first place, as regards internal evidence, there is, to my mind, everything in favour of it. As regards the facts; he had, in fact, by his will done what this letter refers to. He had, by his will, directed that *William Patrick* should take care of his son. He had, by his will, appointed a different guardian, Mr. *Cunningham*, for his eldest daughter by the other lady. He had made provisions also that his executors should deal with his younger daughter; but this boy was to be sent home. Everything in the will tallies exactly with what the letter expresses. Then he contemplated sending home

his son at once, and because he felt that there would be some difficulty in the arrangement of his affairs, he was very anxious that *William Patrick* should have a sum in hand, and he sends him £417 at once, wishing that "such further sum or sums of money may be appropriated for the purpose of maintaining and educating him genteelly, and according to his talents and inclination, not exceeding £500 sterling." His idea seems to me to have been this: About from £900 to £1000 will be enough for my boy. The boy is but a child at present, *William Patrick* will get this sum of £417 at once, and by investing that sum at interest, as 5 per cent. could be got generally at that period of our history, it would produce £20 a year or thereabouts, by means of which he would be able to go on until he got the further sum of £500 from his executors. What could be more simple or natural than such an arrangement?

There has been an amazing struggle on the part of the male Appellant, Mr. *Shedden*, to shew that he knew nothing whatever of this letter until the year 1841, beyond being told (and that only comes out when he was pinched and pressed, in an affidavit he makes—it did not come out at the trial)——

Miss *Shedden*:—My Lord, it was directly sworn to at the trial.

THE LORD CHANCELLOR:—We will take it as having been sworn to at the trial if you like. I shall make precisely the same observation upon it. Feeling, after all his conduct upon the subject of this letter (to which I must hereafter refer), the excessive difficulty of evading this point, he says, "I knew nothing of it until 1841 in detail, but I was told by Mr. *Robert Patrick*, another cousin, in some conversation in 1823, that there was a letter speaking about the marriage with my mother, the details of which I did not know, of the document itself I knew nothing at all." Now the very extraordinary part of the matter is this, that as to this letter, after he had been furnished with a copy of it in 1841, he deals with it in a very particular manner. There had first of all been the suit in 1801, which is commented upon a good deal as evidence of fraud (I pass by that at present), a suit with reference to the legitimacy of Mr. *Shedden*, which was decided in *Scotland*, and afterwards on appeal by your Lordships' House, adversely to Mr. *Shedden*, and that suit

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had turned entirely, no doubt, upon the question whether or not a death-bed marriage would be sufficient in *America*, regard being had to the law of *America*, to give the children the privilege of legitimation. That was decided adversely in the boy's infancy. We have got all the details of that. The decision by the House of Lords was, I think, in 1808.

Then in 1848, after some events had taken place which I must here mention, Mr. *Shedden* had got information through his solicitor of this letter; he had, I think, what is called the original duplicate sent to him. He had never, he says, had the original letter, but he says he got the original duplicate then. And then in 1848 he instituted proceedings in *Scotland* to set aside the proceedings of 1801 for fraud, and in the pleadings in the course of those proceedings he found fault with *William Patrick* for having kept back this letter. He distinctly found fault with him for having kept it back, because he considered it to be of considerable importance with reference to some other matters there mentioned. Afterwards, that is to say, after his voyage to *America* in 1849, on his coming back with some new ideas in his mind which had been there suggested to him, though he says he had heard before from his sister something about his mother having been married previously to the death-bed marriage, but he did not attach much importance to it; in 1849 he brings forward a case something analogous to what we have heard now at the Bar, alleging that there was, in fact, a prior marriage, and that there had been fraud committed, but not any longer a fraud with reference to keeping back that letter which he had before that time dealt with as a genuine and an important letter.

Let us see, then, how the facts stand. Mr. *Shedden* comes back from *India* to *England* in 1823. And here, in justice to Mr. *Patrick*—who really has been attacked in a manner which, to my mind, is inconceivable, except as the result of gross and extraordinary misconception—let me say that Mr. *William Patrick* certainly did his duty to the Appellant, so far as he educated him well. Certainly the Appellant's demeanour before us, as well as his letters, shew that he must have had the advantage of a good education, whatever may be said of the character of the school at which he was placed; because a person whose boyhood had been neglected

could not exhibit the marks of education which Mr. *Shedden* has exhibited. In the year 1823, then, Mr. *Shedden* comes back from *India*, and then it is for the first time, through the medium of Mrs. *Robert Patrick*, that he is informed about the circumstances of his birth, and then also it is that certain documents are sent to him, undoubtedly in October, 1823, for that we have in his own evidence, wholly independently of the question of the list which has been produced, for he says, in his examination as a witness, that in 1823 he saw some of the documents, as he calls them; he will not say that he saw everything in that list, or anything like it, but that he first began to see some of those documents.

Now at the end of that year, 1823, some of the documents having been sent to him, which he says (in a subsequent correspondence that took place in 1829) he then returned, this remarkable fact took place. Some documents, at all events, were sent to him on the 3rd of January, 1824. He says this :—

> Dr. *Patrick* and *William* invited me, and I went to *Scotland*. I knew nothing about the suit or controversy. Mrs. *Patrick* said, "You seem to know so little of your affairs; look at that book, it will give you information." *William Patrick* came and said he must give me some account of this matter.

Then he says :—

> *William Patrick* said the estate was eaten up by debts, and besides, there is a case and opinion received from *America*, which he shewed me. He shewed me printed proceedings. He then tried to smooth me over. He entreated me to remain, and he would do this and that. I said have you letters from my father? Can you shew me his handwriting? This was about October, 1823. I remained there till end of December. Returned to *Edinburgh* 2nd January, 1824. Finally left *Edinburgh* about 4th January. He never said anything about letter from my father, 12th November, 1798. Before this, a letter of *John Patrick* to him had fallen out of some documents that he had sent me. I sent him some extracts. He called and said it was a private letter, and asked to have it back (*duplicate and triplicate handed*).

Then he says :—

> He never shewed me the original of this. I never had it in my custody (*list shewn*). No. 1 is the one that dropped out by mistake. No such letter as 11th November.

and so he goes on. I only read this to shew that I am accurate in saying that in October he received some documents.

That being so, there comes shortly afterwards that letter of the

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3rd of January, 1824, the importance of which is undoubtedly very great. This is to *William Patrick*:—

Dear Sir,—On my arrival last night from the West Country, I received your letter of the 31st ultimo, and I have to thank you very sincerely for the letter of my father to you and the obituary. As I have never seen my father's handwriting before, you will easily be assured that this is a dear relic to me, being, perhaps, his last signature in this world. The time that is now left me before bidding you farewell is so short that I am only able to make you a hurried acknowledgment. In doing this I beg leave to say that no person in the world can lament more deeply than I do the cause which has given rise to my unfortunate feelings and sufferings.

Then there follows a great deal more, which I pass over, because it really has no bearing upon the particular point in controversy.

Therefore, we have this fact, that Mr. *Shedden* is asking about his father's letters. In October, 1823, he is having communication upon that subject, and having asked for them, he has something shewn him. Then we find him saying here in this letter, "I had never seen my father's handwriting." I think, therefore, I am bound to give him credit for the observation that he did not see the original letter of the 12th of November at that time. I think, for reasons which I shall afterwards give, that he saw what is called the duplicate or triplicate, because Mr. *Patrick* having two copies, the duplicate and triplicate, of course for the purpose of conveying information, it would not signify to him in the least which he sent; indeed he might possibly prefer to retain the original in his own possession. That a duplicate and triplicate of this document did come I think is strongly corroborated by other circumstances; indeed it is hardly controverted, because Miss *Shedden* in her argument says that these bills came over, and that some letter or other was written, but that this is not the letter. The Appellants feel compelled to say that, because of course the bills would not come over without some letter or other being written to accompany them. It would be on the face of it absurd to suppose that they would. The bills were remitted to Mr. *William Patrick*, and for what possible purpose they could have been remitted to Mr. *William Patrick* except for the purpose of the education of the child it is difficult to say. I was going to mention that in the Appellant's Appendix there is a quadruplicate of this very bill on Messrs. *Daniel & Co.* for £326. Therefore, I think it is

clear that there existed duplicates and triplicates of this bill, and nothing could be more probable than that *William Patrick* should have shewn to the Appellant a duplicate of this letter in October.

Then, returning to Mr. *Shedden's* evidence, the letter of the 3rd of January was shewn to him, in which he says, "As I have never seen my father's handwriting before, you will easily be assured that this is a dear relic to me, being, perhaps, his last signature in this world." Now what does he produce as being the letter of which he was there speaking? He can now only produce a letter dated 1783, which, of course, it would be ridiculous to say was the letter referred to here. Of course he does not say so; he knows that it cannot be said of a letter of 1783 that it was perhaps his father's last signature. Now what is Mr. *Shedden's* story about this? I must say he is either misled by his strong feelings about his own case, or he has had his mind warped and misled by the extraordinary way in which he has brooded over the case. He has done, probably, as Miss *Shedden* said with regard to one of the witnesses, a man of the name of *Arden*, a man who swore positively to knowing Mrs. *William Shedden*, although on a previous occasion he had said he never knew anything about her—I pointed out the extraordinary discrepancy, and Miss *Shedden's* remark was, "Sometimes the mind so broods over a subject that you begin to believe that which you brood over to be the fact." I think that explains a great deal of what has taken place both in Miss *Shedden's* and Mr. *Shedden's* remarks. I find, as a matter of fact, as far as the written documents go, that we have his own clear and conclusive evidence that he had sent to him in the letter of January, 1824, a document "probably containing his father's last signature in this world;" and then we are told that what was so shewn to him in January, 1824, was not his father's letter of the 12th of November, 1798, which contained probably his last signature in the world and which did deal with those things which concerned him at the last moment of his life, namely, the sending over his son to be educated by Mr. *William Patrick*, together with money to be supplied to him for that purpose. But we are told that the letter so sent was a document referring to some ancient transaction with his first partners, the *M'Calls*. Mr. *Shedden's* story is, that Mr. *Patrick* came back, or rather sent, to say, "Really I have given you a letter

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which is rather important to me, it does not signify to you whether you have one letter or another so long as it is your father's handwriting." Then Mr. *Shedden* says, "I returned the letter as to *M'Call* and accepted this letter of 1783. I was thankful for it and I kept it." We have nothing else whatever by way of explanation.

Miss *Shedden*:—May I interrupt your Lordship—may I say one single word?

THE LORD CHANCELLOR:—If you can point out to me any other witness to support that statement.

Miss *Shedden*:—You will remember that Mr. *Patrick*, by his own statement, led him to suppose that my grandfather could not write for a week before he died.

THE LORD CHANCELLOR:—That is quite immaterial—that has nothing to do with what I am upon. This is utterly irrelevant. I am not misstating the evidence. I must say that I think this throws very grave doubt upon Mr. *Shedden's* testimony in this matter, and that I am not in any way satisfied that he has not had that original letter of the 12th of November, 1798, and has not done something with it. The inference from the facts is all that way. We have nothing but his own testimony upon the subject, and I do ask whether that testimony is testimony which ought to be regarded by us as credible. On the one hand he says in his own letter, "I have got my father's last signature, which is a dear relic to me;" but instead of that Mr. *Shedden* is content to take a letter of 1783, which has no bearing whatever upon himself, and he says he cannot produce anything but that, and this letter which was such a dear relic to him was only a settlement of accounts with the Messrs. *M'Call*. We are asked to take that as against all the other evidence there is about this letter. I say every fact is in accordance with the reality of the letter of the 12th of November, it is in accordance with the sending of these bills, which must be accounted for somehow, so that Mr. *Shedden* is obliged to say that there was some letter of that date, but he says it was not this. What has made me thus strongly express my conviction upon this

point is this, that in the subsequent correspondence which took place in June, 1839, I think there is clearly, to my mind, demonstration of the fact that Mr. *Shedden* did know in 1839 of that document of which he declares he knew nothing till 1841 beyond the fact that a letter existed in which the marriage with his mother was spoken of. And therefore it is very important here to look to the letters which passed in 1839.

Now this fact is most remarkable undoubtedly. This gentleman, although aware of his position in 1823, and although aware of all that had been done in his infancy in 1803, and although coming back to *England* in 1833 with a fortune, yet takes no proceedings to set aside anything that had been done till 1848. It is odd enough in itself that nothing was done till then.

But what took place in the meantime? There had been rather a serious correspondence between him and *William Patrick*, which however had not yet arrived at a quarrel till 1839. The correspondence begins in May, and Mr. *Shedden*, the first-named Appellant, says, "I received your invitation to dinner too late in the evening to send you my reply;" and he says, "I cannot, with my present feelings, join in the spirit of free and happy intercourse which it has been my earnest wish to cultivate, and to see my children follow with you and your family." Then he goes on to complain of many of these things that he now complains of. I do not enter into that in detail. Then, on the 20th of May, Mr. *Patrick* writes thus, "I have received your letter, which I have read over with great surprise and vexation." Why? they had parted on good terms in 1823 and had not seen one another since. They had had a little skirmish in 1823, but nothing of the serious magnitude that is implied here. But Mr. *Shedden* had been brooding over it, and the result is a refusal to see his cousin at dinner. Then comes this letter:

> I have received your letter, which I have read over with great surprise and vexation. A full explanation was given you on a former occasion when you were about to leave this country for *India*. As the events to which you allude happened nearly forty years ago, they are known to, or recollected by, very few persons now alive. By the law of *England*, and by that of *America*, founded on it, subsequent marriage does not legitimate children previously born. This being the law, the civil rights of all children, born before marriage, whose parents were resident in *America*, must be regulated by it. There are many persons of the

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first rank and respectability in *England* whose patrimonial interests have been affected by this law, but in no other respect. There is no doubt that your father (whom I had never seen) on his death-bed wrote a letter appointing me your guardian, and committing you to my charge.

Here the two points of the letter of the 12th of November are mentioned, namely, that on his death-bed he wrote a letter appointing Mr. *Patrick* his guardian and committing his boy to his charge. Then he goes on to say, "But you are mistaken in supposing that I accepted of the guardianship." Then he goes on to explain that that was not the case, and in fact it was not the case as it ultimately happened, for he refused it when he found the position he was likely to be placed in. This letter then raises the issue at once distinctly that some letter of the father existed—that it was a death-bed letter, and that it had reference to the appointment of guardian.

Now, how does Mr. *Shedden* answer that? He answers it in a letter of the 14th of June, 1839, a very remarkable letter in many respects. He says:—

Just to think of you seeking for an American certificate when you had received my father's own letter telling you of his marriage with my mother.

Miss *Shedden* says that what is here called a certificate was an opinion, and we may take it so. Now, observe that Mr. *William Patrick* had not said a word about the letter telling him of the marriage with the Appellant's mother. He mentioned two other facts as being contained in the letter. He mentioned the death-bed letter appointing him as guardian and consigning the boy to his charge—but the answer shews that Mr. *Shedden* knew perfectly well what letter he was referring to, for he says in his answer, "When you had received my father's own letter telling you of his marriage with my mother." This is an enormously long letter of the Appellant, but I have here the most important passages marked. He complains very much of what was done. He says that his father wished to give him the property; and then he relies a great deal upon the letter of *John Patrick*, on which also Miss *Shedden* laid great stress. Then comes another passage to which I call particular attention:—

Again, when you speak of my education, you will recollect when you told me in 1823 that my father had sent you home about £400 to £500 for it, and you

offered to give me an account of your disbursements, I told you that I wanted no particulars, but if you exceeded the amount I would be happy to send you a cheque on my banker for it—any agent would have paid my bills.

Then he writes this as to a suggested purchase of his father's property:

Consequently, the above price of £10,000 would have been higher, therefore conferring no favour on me, and I was ready then to give it—particularly as it is likely that no other person knowing my claims would be anxious to have it, or at all events without an indemnity bond; for although I am not able to establish just now my father's first private marriage, which I have given you notice of, what is known already would not be in your favour; and I conceive it to be my duty now to inform you that my sister told me it was really the case—that my mother was a respectable young person, living with her parents upon a small farm on my father's land, and he did not acknowledge the marriage publicly on account of her humble birth, but nevertheless he always treated her as his wife. And Mr. *Robert Shedden* informed me that he found her at the head of my father's table when he went to *America*, which is not against the statement. Moreover, my sister told me in 1829, when she mentioned these circumstances, that a woman was still alive who was present at the first private marriage. As for the truth of the thing I can only say that my sister believed it, and I can depend upon her veracity.

I think this is important as shewing how fully aware he seems to have been of all the circumstances that he could set up in favour of his present contest, but it is even much more so on account of the important passages referring to the death-bed letter of *William Shedden*.

But the matter does not rest there. This very singular correspondence goes on, and on the 29th of June Mr. *William Patrick* writes thus:—

Sir,—I have received yours of this day, and shall take an early opportunity of searching for and sending you a copy of your father's will, which I hope I shall find preserved among my old papers. As for my brother's private letters to me, which were formerly sent you for perusal, you seem to have retained copies of them, so you can have no occasion to ask for additional copies of them.

Observe the words "Sent you for perusal." This is important, because it explains a good deal that was afterwards done about the document sent in October. He goes on:—

It is not true that the will or any papers were withheld; the printed appeal cases which you have seen prove the contrary. You talk of a reference to arbiters.

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Then on the 2nd of July there is a still more important letter:—

Sir,—Having now found the probate of your father's will, I send you a copy. From this you will see that I am only only appointed to the personal guardianship of you for the purpose of superintending and directing your education. You have seen from the opinion of Messrs. *Hamilton* and *Harrison*, taken in 1799, that the marriage could not legitimise children previously born.

Observe what follows:—

*You know from the correspondence that the sum remitted for your maintenance and education was* £417.

Now that letter of the 12th of November is the only place where that exact sum is mentioned. There is no other place whatever in which the £417 appears. In *John Patrick's* letters it is said to be between £400 and £500. But *William Patrick* says: "You know from the correspondence that the sum remitted for your maintenance and education was £417." Then what have we here? We have *William Patrick* at first saying to him: "You know very well that you were sent over to my care, and I was appointed guardian by a death-bed letter." His answer to that is: "Yes; and you know that you had a letter mentioning my mother's marriage. Only think of your doing this when you had my father's death-bed letter about the marriage of my mother." Therefore, we have two parts of the letter agreed on by both sides. Now we reach at last the whole letter by degrees. *William Patrick* says: "You know from the correspondence that the sum remitted" (because he had been asking what the sum was that he might repay it) "for your maintenance and education was £417, and you will see by the will that the executors were empowered to make further remittances for the purpose."

Now, I say that such evidence as this does satisfy my mind completely that Mr. *Shedden* did see this letter, and it satisfies me more completely that the letter which he received in January, 1824, was that identical letter, because it is the only letter which corresponds with the statement there of a letter written a short time before his father's death.

Really all the labour of going through these letters in this manner ought not to have been thrown upon this tribunal, because what is there from beginning to end which would cast a shadow

of suspicion upon anybody as being concerned in forging this letter? You have everybody writing to the same effect as to that which took place. There is the fact of the marriage; there is the fact of the remittance of £417; there is the fact of the bill being paid exactly as is said in the letter; there is the fact of *John Patrick* being made executor just as he is said in the letter to have been the executor; there is the fact of the bond existing just as is said in the letter, which shews what were the debts existing, but which it is said we are not to believe now. You have all these facts put together, and I must say most unfeignedly that I come without hesitation to the conclusion which is so well expressed by Lord *Fullerton* in his judgment on the proceedings for reduction:—

> Now the first thing which must strike every one not absolutely blinded by personal prejudices on reading these letters is, that the letters as they stand are absolutely negative of any fraudulent intent whatever. They are the letters of persons who had interests adverse to that of the Pursuer, and of course were lawfully entitled to defend their own interests, but who were at the same time desirous that those of the Pursuer should be fairly protected, and who recommended the steps necessary for that purpose.

Now, my Lords, having come to the conclusion at which I have arrived, I shall be very brief in my observations with reference to the alleged subsequent misconduct of the *Patricks*, from which we are told that we ought to infer previous fraud of this gross description. What we are asked to infer is this, that this gentleman being evidently taken by surprise by a death, which though expected in one sense was not expected to be so sudden—a letter is written in his name which had been deliberately planned, that that letter so sent was fabricated and forged, and that the alleged copies which have "duplicate" and "triplicate" put upon them are now produced. This "duplicate" and "triplicate" being attested by a clerk, one *Mills* (who, be it observed, as I gather from the Appellants' own case, had been employed for four years in his master's service, the date of his appointment being 1794) are also wholly fraudulent, and we are asked to suppose that *Mills* falsely testified to the existence of a letter which did not ever exist, but which was a forgery. All these things we are asked to believe. We are asked also to hold that there is no proper and legitimate evidence of the existence of this letter, there being to

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my mind the clearest and plainest evidence of its loss, and the consequence of that loss being the right to have recourse to the "duplicate" and "triplicate" of that letter so attested by *Mills*. These are monstrous assumptions to make, and they could not be established except by the clearest and plainest proofs of such deliberate fraud on the part of the parties. Now what is the evidence of fraud? That *William Patrick* accepts the guardianship, which at the first moment in a sense he did. That he puts his brother *Robert* immediately into possession of the estate under what is called a "retour" in *Scotland*, and that he keeps back the fact of the child having been born——

Miss *Shedden*:—He was the judicial factor.

THE LORD CHANCELLOR:—You told us that, Miss *Shedden*, every day we sat, and four times every day, that he was the judicial factor—what we call the receiver to the estate—being appointed judicial factor at that time in consequence of the expected debts. The debts were expected, I have no doubt, to be much more heavy than they were found to be. There was a heavy debt of £4000 on the bond, which was quite a surprise to them. There is no doubt that the *Patricks* reasonably expected much more serious debts. There was a great deal said by Miss *Shedden* about a bond for £700. It is impossible to follow all the details of these matters. We cannot grapple with them. We are asked now after an interval of sixty years to sift and examine all these transactions as if they had occurred only yesterday, and of course it cannot be done. Miss *Shedden* has asked for a new trial, because she says if you let her take all the accounts of the partnership of *Shedden & Co.* in *London*, and *Shedden, Patrick, & Co.* in *New York*, she can prove that there was no debt to justify the bond for £4000. But we are now dealing with alleged fraud on the part of *William Patrick*. The Appellants say: "You, the judicial factor, you, the person who was entrusted with the care of the boy, and who undertook to take care of him, you put upon the records of the Court a sham suit. You employed a sham agent; he was a man indebted to you; he was a tool and creature of your own. You bring forward a sham case, and in that sham case you recover the estate for your brother *Robert*." And all this

is said notwithstanding the proceedings in 1848, in which Lord *Fullerton* and the other Judges, having the whole of this correspondence and these facts, including this judicial factorship and the alleged guardianship, before them, came to the conclusion that they amounted to no evidence of fraud whatever.

I have not time to read that judgment. I am taking up a great deal of your Lordships' time, and that of the public, who are interested in other causes; and it would not be right to go through that case of 1848 again. I can come to no other conclusion than that *William Patrick* was placed in a difficult and delicate position. There are many men who would say in such a case, "I will have nothing to do with the matter, I will wash my hands of the concern. I have on the one hand my brother, who up to the time of the appearance of this child, whom nobody had heard of before in my family, was supposed to be the heir of the property, and I find an attempt by this marriage to oust him from it. I do not believe that this will succeed, because the marriage law of *America* would not allow such a marriage as this to legitimate the children. Still that is a moot and doubtful point, which will have to be investigated." It might have been better for him to renounce all charge as to the children. But in justice to him we should examine what he does. He writes a letter to the executors to tell them his difficulties, and he says, "I will not be guardian of the child." He declines entirely to be guardian of the child. He says, "You ought to take it upon you to defend the child's interests." They decline to enter into that contention. Then he says, "The mother ought to do it." Then comes that singular episode of the mother's letter. On the 3rd of September she writes to *Robert Patrick* an expostulatory letter, imploring pity rather than otherwise, in reference to dealing with her child. She says that the marriage was perfectly solemn, and that the will was perfectly solemn, but not a word does she say in that letter of any previous marriage.

Then it is said there exists a piece of evidence which the Appellants have discovered by a most marvellous circumstance, and which shews, as they allege, a gross fraud on the part of *William Patrick* in this matter. "We have discovered," they say, "in the box of *John Patrick* copies of two affidavits made and sent over

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by Mrs. *Vincent* to prove a previous marriage, and that *William Patrick* kept these back from the Court, and did not allow the House of Lords to know of this evidence." Now just let us consider for a moment how that stands. It stands thus: these affidavits were not sent to *William Patrick* by Mrs. *Vincent*, they were sent to her own solicitors, persons as competent to act as Mr. *William Patrick* himself, namely, to Messrs. *Cunninghame* and *Macfarlane*. How does Miss *Shedden* deal with that fact? She says they lived in the same street as Mr. *William Patrick*, and it was very easy for *William Patrick* to go to them and manage them according to his own interest and that of his brother *Robert*. Now this is just one example of the way in which charges are dealt out against all persons connected with this case. But how is the business of life to be conducted if fraud is to be assumed in this manner? We all know that fraud is easy, if men are fraudulent; but the presumption is in favour of honesty till the contrary is proved. It is asked, Why did not Messrs. *Cunninghame & Macfarlane* proceed? I think I can answer that question at once. There never were more absurd documents sent over than those two affidavits. No solicitor would for a moment attach the slightest importance to them, unless they could be followed up: I quite agree that they might be followed up, and that they called for inquiry, but *per se* they were worth nothing. They were affidavits made by the nurse and another servant before a magistrate, to say that the mother was highly respected, that she was received by everybody as a married woman, and that they knew this of their own knowledge. Any lawyer receiving these affidavits would say, "What is the use of these? Why do not you give me affidavits of the persons who, you say, saw her and respected her, and received her in society? Here is a man marrying on his death-bed, a thing itself requiring great explanation, if he was ever married before, and the only explanation I get is these two documents. Mr. *William Patrick* has copies of them, and he writes to say, what falsehoods these must be." Can any one be surprised at these absurd statements being thought little of, when Dr. *Hosack* was alive, and he was an executor; and when Mr. *Farquhar* was alive, and he was an executor? Why did not Dr. *Hosack* and Mr. *Farquhar* send over an affidavit, to say that they knew of

that previous marriage, and that this marriage on the death-bed was only for some reason which we have never yet heard of; and that there had been a marriage before? I must say that to accuse *William Patrick* of any impropriety in not submitting to the House of Lords that which the lady's own solicitor never ventured to submit to anybody, seems to me one of the most singular contentions that can possibly be set up.

I will at once concede to Miss *Shedden* that a man placed in the position in which Mr. *William Patrick* was placed had better not act as guardian. It was a very difficult position. I concede at once that Mr. *William Patrick* might have done better to say, "I will wash my hands of the whole matter altogether." That might have been very hard upon his brother and other persons interested in claiming his assistance; but still a man in such a difficult position must do his best.

But then, as to the appointment of Mr. *Crawfurd* to act as next friend for the infant. *William Patrick's* first proposal to the executors is, Do you, the executors, take the defence of the child's interests in hand? The next proposal is, Do you, Mrs. *Vincent*, the child's mother, then married to her second husband, take it in hand? His next proposal is, whoever wins let him pay all the costs. An extremely fair proposal. Then when the decision is given against the child's legitimacy in the Court below, Mr. *Crawfurd* himself appeals, and, as far as I can see, the most able counsel of the day, both at the hearing in the Court below, and at the Bar of this House, were procured. If there had been any fraud on the part of the *Patricks*, would not those counsel have suggested everything that ought to be suggested? Among other things, it is said that *William Patrick* kept back evidence. It is said that there was evidence that Mr. *Shedden* talked of returning to *Scotland*. He would not let his estates for more than a year at a time, and that, it is said, shews an *animus revertendi*. We all know how recently it has been settled, that there can be the slightest hope of proving a man to have had a Scotch domicil who has been twenty-eight years settled, first in the Colonies, and afterwards in the *United States of America* (1). Certainly at that time it would have been considered quite hopeless. But with

(1) See *Udny* v. *Udny*, *supra*, p. 441.

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what we now know, it is just possible that some of those letters might have been important, with reference to the possibility of his returning to *Scotland* as bearing upon the question of domicil; but *William Patrick* could not at that time possibly have conceived them to be in that respect important.

Then, I ask, what explanation has been given of this death-bed marriage, the fact of which is clearly proved? I have heard no explanation given at all of it. I have only heard that the Earl of *Dundonald* was married two or three times over, and that other people have been married two or three times over. But there was some particular reason for it in each of those cases. But here there is no reason whatever shewn why this second marriage should have taken place, if all the world knew of the marriage before. Mr. *Shedden* says, in his letter in 1839, that the marriage was kept secret on account of the lady's position in life. We are told now that all the world knew it. I cannot, I confess, see anything at all to shake that which is my firm belief, that those letters written by members of the family were genuine letters, describing what passed as it passed, and that the letter of the 12th of November, 1798, was authentic as well as genuine—authentic, as being written by the person by whom it purported to be written, and genuine, as expressing his real sentiments.

My Lords, I despair of going through all the details which have been brought before us to shew that there is the mark of a rascal here, and there is the mark of a scoundrel there. I have dealt with the broader features of the case. I must say my own conclusion is, that *William Patrick*, placed as he was in an extremely difficult position, if he had been aware of all that might be said hereafter, might possibly have taken a different course, but that he did his best, and that having chosen his course, he did supply all the information which it was right and proper for him to supply. He did furnish the best counsel he could for the persons whose case was to be argued. He undertook that all the expenses of the case, whichever side should fail, should be paid by the winner, though it would have been difficult, perhaps, to maintain against the infant the bargain that if he won he should pay the costs, if the result had been the other way. It might (as I have said) have been better if the difficult task had fallen into other hands, but I

must add that I think he did extricate himself from the difficulties of his position as well as any person in such a position could do. Whether he might have examined, with Mr. *Shedden's* assistance, all the witnesses in *America*, in order to ascertain more facts about this child, it is not for us to inquire. I must say that it is not reasonable to expect that he should do what the lady's own solicitor did not do.

Miss *Shedden*:—They had not a farthing, and lawyers will not act without money. They had exhausted their funds so as to prevent their coming over.

THE LORD CHANCELLOR:—That is a most improper interposition, I must have you removed if you do not stop. Mrs. *Vincent* had friends in *America*. There was this Mr. *Cunninghame*, or a gentleman of the same name. I do not know whether he was a relation of Mr. *Cunninghame*, of the firm of *Cunninghame & Macfarlane*. She married a person who was said to be in a good position—Captain *Vincent*, the master of a merchant vessel—and I see no reason why she should not have furnished that which it would have been so easy to furnish, the evidence which is now supplied, at this enormous distance of time, of persons who could speak from their own knowledge as to the way in which she was received in society. That evidence, standing quite alone and uncontradicted, would have established the fact of a prior marriage, because, of course, the presumption of a marriage is very strong. But if, according to the theory now set up, there had been a prior marriage, which was known to everybody, then there was not a shadow of ground for having a second marriage. That second marriage, unexplained as it is, wholly cuts away the ground for any such prior marriage.

I may just refer to the evidence of one of the witnesses, a man named *Arden*, as shewing the extreme danger of acting upon evidence with respect to the condition in which people were living, given after the lapse of sixty years, and after controversies have arisen on the subject. It is a strong instance of the difficulty we are placed in. The witness was in his eighty-third year. The question is:—

*Q.* Were you personally acquainted with his wife, Mrs. *Shedden*? *A.* I was always acquainted with Mrs. *Shedden* as a lady of distinction and propriety. I

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was personally acquainted with her, and have met her at different places, and in company at my aunt's, Mrs. *Hamilton's*. *Q.* Do you know how she was regarded in the society in which she lived? *A.* She was always esteemed as a lady of distinction, as a lady of good manners, and very respectable:

and so on. Then he goes through the names of people in the best possible position. Then he is cross-examined. There is a paper put into his hands, and he says in his cross-examination:—

I do not recollect that I have ever seen the person referred to in my direct examination as Mrs. *Shedden*.

This is the person who had before stated that he was acquainted with her, and saw her at his aunt's, and at other places, and had given her the highest reputation.

I have heard Mrs. *Hamilton* speak of Mrs. *Shedden* repeatedly as having been at her (Mrs. *Hamilton's*) house, and that is the only knowledge I have on the subject.

He is asked:—

Did you or not when examined as a witness, in reference to Mr. *William Shedden* in 1850, as already stated, use these or similar words?

He answers:—

I do not know; you have there what I said on that occasion; I cannot recollect what I said on the occasion. *Q.* Was the deposition which you made in 1850, correct, according to your best belief and recollection, at the time? *A.* I presume it was right. I have no doubt it was.

This is the man who had before sworn positively to his personal knowledge of her. Upon his re-examination, it is attempted to set him up by asking:—

You have stated that your deposition of 1850, in which you say that you do not recollect that you have ever seen Mrs. *Shedden*, was correct according to your best knowledge and belief at that time. Have you since the taking of that deposition been enabled to recall the matter more particularly to your recollection, so as to say to-day that you were personally acquainted with her, as you have stated in your direct examination?

So that he would be supposed to have a more distinct recollection of her eight or nine years afterwards than he had eight or nine years before. His answer is:—

I now say that I did not mean to say in my direct examination that I was personally acquainted with her. I knew her, and where she associated, and as Mrs. *Shedden*; when I bowed to her, she bowed in answer.

That really shews the extreme danger of such evidence as that. People go talking round the town about a certain case. All the old people who can be found are collected together and talk together. And Miss *Shedden* very ingeniously put it to me, when I called her attention to this sort of evidence, that people sometimes brood over things till they believe those things which they brood over to be facts.

Miss *Shedden*:—I was speaking of Mr. *William Patrick*.

THE LORD CHANCELLOR:—I took it down at the time, and I quite agree with it. I believe that that is the real explanation of the whole case. Therefore, as regards that part of the case, I am of opinion that the decision is according to the evidence. I do not mean to go through the details (which we did while hearing Miss *Shedden*) of evidence which was rejected, and which, she says, ought to have been admitted. It is absurd to talk about going into accounts, and letters produced as containing declarations which were no declarations at all. All that was most properly rejected. And, at the same time, I have been unable to discover anything that was improperly admitted at the trial. I am clearly of opinion that nothing was improperly excluded, and that nothing was improperly admitted. And as to the application for a new trial, when a gentleman, first of all, had from 1823 to 1848 to consider whether he would proceed, and then after 1848 had the advantage, in 1849, of going to *America* and getting all the evidence he could get, and then has had the advantage under this new Act of bringing to the Bar all the evidence he has so collected, and then, when there has been decision after decision, he comes and tells us that he is taken by surprise, and that he ought to be admitted now to produce further evidence; if that is to be allowed, how can any suit ever be brought to an end?

My Lords, I said that I would just refer to some letters of Dr. *Robert Patrick's*, some letters picked up since the cause was heard, written from *Minorca*, in which he complains of not hearing at all from Mr. *William Patrick*. He says the letters do not reach him. To which, Mr. *Shedden*, the Appellant, appends one of his very characteristic notes, in which he states that communications passed safely every few days between *England* and the *Medi-*

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*terranean,* including *Minorca,* throughout the year 1799. In that letter of Dr. *Robert Patrick's,* he says, " I always expected that he would leave his property to his," then a word is left in blank—as a great deal of this evidence is printed by the Appellants,—" his [blank] children." I suppose that means " his bastard children." The same sort of blank is left in other cases. That would be no declaration; I do not use it in that sense. The letter, in one sense, would be rather favourable to Miss *Shedden's* view, namely, what Miss *Shedden* was wishing to persuade us, that though the family might choose to call them bastards, still they knew all about the existence of these children. But I do not find a single trace of Mr. *William Shedden,* as to these children, nor anything to indicate that they had been heard of until the father's (known) death, except in this passage. It looks as if some little gossip had oozed out about these children, but it amounts to no more.

Having dealt with the application for a new trial and the objections to the acceptance of evidence, and the decision upon the evidence, I will only say a word upon the question of directing an issue for trial by jury. My noble and learned friend (Lord *Chelmsford*), I know has more to say upon that point. It is an entire mistake for Miss *Shedden* to suppose that this Act of Parliament was meant to direct and impose upon a Judge the duty of trying these matters of fact by a jury. Nothing can be more clear than this. The Legislature had before their minds the law upon the subject when they were introducing a new law, and no doubt they felt the extreme grievance which might be caused by forcing people to contest these matters before juries, and the extreme inconvenience and expense of collecting people from all parts of the world and keeping them in an assize town, to come before a jury, and, on the other hand, the jury may be detained there day after day upon one case. In one instance, Miss *Shedden* is right, in the case of an heir-at-law who has been disinherited, he has, on the issue *Devisavit vel non,* a right to a trial by jury. But in no other case is there such a right. And cases of fraud in reference to matters of the greatest magnitude, and other rights of property, are tried constantly in Courts of Equity (*Small* v. *Attwood,* for instance (1)), and have been so tried from all time, without the inter-

(1) You. 407; 6 Cl. & Fin. 232.

vention of a jury. The Act says that the learned Judge is to follow the course of procedure under the *Divorce Act* where the course is plainly pointed out. He is not directed there to have a jury except in certain specified cases which have nothing in common with this case. There is no such direction in the Act with reference to this case. That being so, it is left to the discretion of the learned Judge, and I cannot interfere with that discretion, exercised as it was by Sir *Cresswell Cresswell*, assisted by Mr. Justice *Wightman* and Mr. Justice *Vaughan Williams*.

Miss *Shedden*:—No, my Lord, it was only Sir *Cresswell Cresswell* who refused it.

THE LORD CHANCELLOR:—Sir *Cresswell Cresswell* was the Judge to exercise the discretion, but he had the assistance of Mr. Justice *Wightman* and of Mr. Justice *Vaughan Williams*, he had their assistance in the trial, and the question is, whether he exercised a sound discretion in saying that he would rather try the case with those two learned Judges, than whom he could not have had two more competent assessors, than submit the case to a jury—which would be one of the most damaging things that could happen to Miss *Shedden*—because I venture to say she would not find any jury to sit for twenty-four days, as your Lordships have done, without being long before that time wearied out. In the first three days she, Miss *Shedden*, argued the case very ably, and I felt that she had made some points deserving great consideration—and I gave great consideration to them. I must say that for the remaining nineteen or twenty days she did nothing but weaken the force of her previous arguments. The consequence is, of course, that the case has been exceedingly embarrassed. One has had to read through the whole case with all this immense mass of printed matter. I have read every letter through carefully, and in reading every letter through, I have used none against Miss *Shedden* in delivering my opinion, which I ought not to have read, and I believe that I have read a great many which I ought not to have read against the other side. And in all this mass of papers so improperly thrust upon us, I have been unable to discover anything to shake me in the conviction at which I have arrived, and which was expressed by the learned Judges who gave judgment upon the

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action for reduction in *Scotland*, and by the other three learned Judges to whom I have referred in the Court of Divorce; and I must say that I concur with the Judge Ordinary in saying that I deeply regret the result as regards Miss *Shedden*, believing, as she naturally does, that that which she receives from her parent is true. She has been imbued with conviction which nothing will shake, which the decision of all your Lordships' House assembled together, or the decision of all the learned Judges in the country assembled together, or the decision of all the juries in the country assembled together, would not shake if the decision were against her. But where fraud is averred fraud must be proved. Fraud has been averred here, but it has not been proved. It is necessary for me, therefore to conclude, by moving your Lordships that these appeals be dismissed with costs.

LORD CHELMSFORD:—

My Lords, this is an appeal and supplemental appeal against two decrees or orders of the Court for Divorce and Matrimonial Causes, dismissing a Petition presented by the Appellants under the *Legitimacy Declaration Act*, 1858, by which they prayed that Court to pronounce that *William Shedden* and *Ann Wilson*, the father and mother of the Appellant, *William Patrick Ralston Shedden*, were lawfully married prior to his birth, and that he was their legitimate son and heir, and a natural-born subject of Her Majesty.

The argument of the appeal was conducted principally by the female Appellant, with great ability, but was prolonged to the extraordinary and unnecessary length of twenty-four days by incessant repetitions, perpetual digressions, and the continual introduction of matters which were not in evidence before the Court below, and which were wholly irrelevant to the questions to be determined. Considerable embarrassment was also occasioned by the Appellants having printed a volume containing more than 1100 pages, in which they had introduced a variety of letters and documents (many of them not very faithfully given), which formed no part of the evidence upon which your Lordships were called upon to decide. To these frequent reference was made during the argument, occasioning the necessity for the continual interference of

the House, which, being submitted to for the moment, was almost immediately afterwards disregarded, and the irregularities which had to be thus continually checked were over and over again repeated.

The case, though thus drawn out to such an unreasonable length, really lies in a very narrow compass, and its merits may, without impropriety, be said to depend upon the genuineness of a single document, the disputed letter of the 12th of November, 1798. But the real questions have been completely obscured in the cloud raised over them by the mode in which the case has been argued by the Appellants.

Those questions are:—

1. Whether the Appellants were entitled as of right to have their Petition tried by a jury, or whether the Judge Ordinary exercised a proper judicial discretion in refusing a jury trial.

2. Whether the decree pronounced upon the Petition was justified by the evidence before the Court.

3. Whether improper evidence was admitted, or admissible evidence rejected.

4. Whether the application of the Appellants for a rehearing upon the circumstances stated in their affidavits presented to the Court ought to have been granted.

The first question, as to the right of the Appellants to have their Petition tried by a jury, may be very shortly disposed of. By the 4th section of the *Legitimacy Declaration Act*, 1858, all the provisions of the prior Act establishing the Court for Divorce and Matrimonial Causes were extended to applications and proceedings in that Court under the later Act. By the 36th section of the former Act, 20 & 21 Vict. c. 85, it is enacted, that in questions of fact arising in proceedings under the Act it shall be lawful for, but, except as hereinbefore provided, not obligatory upon, the Court to direct the truth thereof to be determined before itself, or before any one or more of the Judges of the said Court, by the verdict of a special or common jury. The exception thereinbefore provided for is contained in the 28th section, which authorizes parties to insist upon having the contested matters of fact tried by a jury, but it is unnecessary to say that the excepted cases have no analogy to the case of the Appellants.

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The 35th section of the Act for establishing the Court of Probate, 20 & 21 Vict. c. 77, was referred to for the purpose of proving that where an heir-at-law is interested the Legislature has recognised his right to have a trial by jury. This Act has nothing whatever to do with the question, and I should not have noticed it if it had not been that I was desirous of shewing that no part of the argument had been overlooked. If this Act has any application, it refers only to cases in which an undisputed heir-at-law is party; and the question in the present case being whether Mr. *Shedden* is legitimate, and therefore truly the heir-at-law, it is, of course, wholly inapplicable to him. It was clearly in the discretion of the Judge Ordinary to decide whether the trial of the Appellants' Petition should be by a jury, or before himself, either alone or with other Judges of the Court, and the Appellants had no right to insist upon having a jury.

But although your Lordships would be very reluctant to overrule the judicial discretion upon this subject, yet, if it could be shewn to have been improperly or capriciously exercised, it might be rightly subject to revision. But it appears to me that this was peculiarly a case in which the judgment of three learned and able Judges, accustomed to weigh evidence, and consider its bearing, was far preferable to that of a jury only accidentally (if at all) experienced in legal inquiries. I can easily understand that the Appellants may have earnestly desired a trial by jury in the confidence that the powers possessed by the female Appellant would enable her to enlist their sympathies, and to exercise a considerable influence over their minds; but for the calm and impartial ascertainment of the truth no better tribunal could possibly be imagined than that which was constituted by the learned Judges who tried the Petition.

The case of the Appellants having been thus, in my opinion, tried and investigated under the most favourable circumstances for arriving at the truth by Judges who had many of the witnesses examined *vivâ voce* before them (an advantage which your Lordships have not possessed), the question is, whether upon the evidence produced they came to an erroneous conclusion that *William Shedden* and *Ann Wilson*, the father and mother of the Appellant, Mr. *Shedden*, were not married prior to his birth, and that he was

not their legitimate son and heir, and a natural-born subject of Her Majesty.

The Appellant Mr. *Shedden* was the son of *William Shedden* and *Ann Wilson*, and was born at *New York* in the year 1793. His father, *William Shedden*, went to *America* at an early age, and settled as a merchant in *Virginia*. On the death of his father he succeeded as heir-at-law to an estate in *Ayrshire*, called *Roughwood*. When the Revolution in *America* broke out he went to *Bermuda*, but afterwards returned to the *United States of America*, where he carried on business at *New York* until his death on the 13th of November, 1798. For many years before his death *Ann Wilson*, the mother of the Appellant, was living with him, sitting at the head of his table, and acting in every respect as the mistress of the establishment, being visited by the respectable families in *New York*, and generally reputed to be his wife. A few days before *William Shedden's* death, viz., on the 7th of November, 1798, he went through a ceremony of marriage with *Ann Wilson*, upon the object and effect of which the case mainly turns. The Respondent says that the communication of the fact of this marriage was made in a letter from *William Shedden*, dated on the 12th of November, 1798, the day before his death, in which he wrote to *William Patrick*:—

"I have married Miss *Ann Wilson*, which is approved of by my friends here, and which restores her and two fine children I have by her to honour and credit."

The original of this letter is not forthcoming, and it was the subject of dispute at the trial whether any original letter containing the passage above mentioned ever existed.

As this letter, if proved to have ever been in existence, would be fatal to the Appellant's case in the Court below which (as observed) was founded upon the allegation of a marriage of his parents prior to the birth of the Appellant Mr. *Shedden*, every effort was made to impeach its genuineness, and to discredit the evidence in support of its having been written by Mr. *William Shedden*. Accordingly it was strongly and repeatedly asserted in argument that copies of this letter, called respectively "duplicate" and "triplicate" were fabricated for the purpose of carrying out the designs of the *Patricks* which were alleged to have been formed even during

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the life of *William Shedden*, to secure his estates to the person next in succession in the event of the illegitimacy of the Appellant being established. The persons said to be implicated in this conspiracy to deprive the Appellant of his inheritance are various members of the *Patrick* family, and principally Mr. *William Patrick* of *Edinburgh*, together with *Robert Shedden*, junior, and *Hugh Crawfurd*, besides some subordinate instruments of the principal parties. The manner in which their fraudulent scheme was alleged to have been carried out was, first, by fabricating debts so as to reduce the value of the estates of *William Shedden*, and then by forging various letters to prove the illegitimacy of the Appellant.

As the proof of the illegitimacy of the Appellant would at once have opened the way to the succession of Dr. *Robert Patrick* to the estates, it is difficult to understand why the unnecessary trouble should have been taken to create debts whereby their value would be diminished. But to dispose at once of this question of fictitious debts. Amongst those asserted to have been fabricated is one of £4000 upon a bond given by *William Shedden* of the date of the 3rd of September, 1798. This bond was proved in the regular way at the trial, by a witness, *William George Shedden*, who swore to the signature of his uncle *Robert Shedden*, junior, the attesting witness, who was dead. Not the slightest attempt was made to disprove the validity of this bond at the trial, and yet Miss *Shedden* did not hesitate to assert repeatedly in the course of her argument that the bond was a forgery, and that *William George Shedden* had been guilty of perjury in proving his uncle's signature.

With respect to the letter of the 12th of November, 1798, upon which the question of the Appellant's illegitimacy principally rests, it was not denied in argument that some letter of that date was written by *William Shedden* enclosing bills of exchange. It was denied, however, that such letter contained the material statement of his marriage with *Ann Wilson*, by which she and the children were restored to honour and credit; but it was strongly asserted that the *Patricks* suppressed the original of that letter, and produced only copies, which they called respectively "duplicate" and "triplicate" in which they had caused this passage to be inserted. The reason of the non-production of the alleged original letter was the subject of direct conflict of evidence between the parties.

*William Patrick*, who was examined in the cause under a commission, swore that he handed the letter of the 12th of November, 1798, to the Appellant, Mr. *Shedden*, in the year 1823 or 1824, and that he never got it back nor saw it afterwards. The Appellant swore that he never had in his custody nor saw the original of this letter. He stated that *William Patrick* did give him a letter in his father's handwriting, written five or six days before his father's death, but that he afterwards said "he would give the Appellant another of his father's signature, and gave him one of the 17th of April, 1783, and that he had the former letter in his possession not more than twenty-four hours."

Sir *Cresswell Cresswell* and Mr. Justice *Wightman* were of opinion, not only that there was an original letter of the date of the 12th of November, 1798, of the tenor of the copies called "duplicate" and "triplicate" (upon which fact Mr. Justice *Williams* expressly agreed with them), but also that this original letter had been given to Mr. *Shedden*, the Appellant, and never returned. As these facts are of vital importance in the case, I will examine whether, upon the evidence, the learned Judges were justified in the conclusions at which they arrived.

The copies of the letters which were produced were (as already observed) called "duplicate" and "triplicate." A great deal of criticism was employed in argument upon the application of these names to copies of letters; but it appears to me, that covering letters of the second and third sets of bills of exchange might, without any great offence to propriety, be so called. It is observable, also, that they profess to be only copies, as the word "signed" is written against the name of *William Shedden*. They are attested by *John Mills*, by which I understand him to vouch for the correctness of the copies, the original of which is said to have been sent "*per* ship *Fanny*, *viâ Greenock*." Now this copy of the letter of the 12th of November, 1798, in the most material part of it at least, is alleged by the Appellants to be a fabrication. But if this were so, *John Mills* must have been a confederate in the conspiracy to render the Appellant illegitimate, and without any assignable motive must have asserted what he knew to be false, that there was an original letter of the date and of the contents of the one in question.

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Strong proof of the existence of such an original letter is afforded by the evidence in the case. The copy of the letter produced states that the writer of the original had ordered his executors to send his boy to Mr. *William Patrick*, whom he addresses as "my very dear nephew." And the letter proceeds:—

I now remit first of *Griffiths & Walrond's* exchange on Messrs. *Thomas Daniel & Co., London*, dated *Barbadoes*, the 23rd of June, at 60 d/s, for £326 15*s.* 8*d.*, and first of *B. Farquharson & Co.*, on *Barclay, London*, dated *Martinico*, the 21st of July, at 60 d/s, for £91, together £417 15*s.* 8*d.* sterling; and I desire that such further sum or sums of money may be appropriated for the purpose of maintaining and educating him, and according to his talents and inclination, not exceeding £500 sterling, without the consent of his executors, of whom you are to be totally independent in the business."

All this is in exact conformity to what is said in the will of *William Shedden*, which it can hardly be imagined had been seen by the writer of the duplicate and triplicate copies, so as to enable him to give the supposed original an air of truth from its correspondence with the expressed intentions of the testator. By his will, dated the 7th of November, 1798, *William Shedden* orders, wills, and directs that his son *William*, as soon as his executors and trustees thereinafter mentioned shall think proper and convenient, be sent by them to his nephew *William Patrick*, Esquire, writer to the signet at *Edinburgh*, and he adds:—

I do hereby nominate and appoint the said *William Patrick* the guardian of my said son, and I direct that he be educated by my said nephew, and that he be brought up to such profession as my said nephew shall think best suited to his talents and inclinations.

Of course, if the "duplicate" and "triplicate" are true copies of a letter written on the 12th of November, 1798, the day before *William Shedden's* death, this close correspondence in terms with the will is a strong circumstance in favour of the genuineness of the original letter itself.

The fact of the transmission of bills of exchange of the exact description of those stated in the duplicate is confirmed by an entry in the ledger of *William Patrick*, under date of January, 1799, in which he charges the Appellant, by the name of *William Shedden*, junior, with—

Postage of different letters from your father, enclosing first, second, and third of two bills of exchange for your behoof, one for £326 15*s.* 8*d.*, the other for £91; in all, £417 15*s.* 8*d.* sterling.

The mere fact of the bills being sent to *William Patrick* does not, of course, prove the purpose to which they were to be applied; and the Appellants, in their argument, asserted that they were intended for some other object than that which is stated in the "duplicate" and "triplicate." But in a letter from *John Patrick*, of *New York*, to *William Patrick*, dated the 18th of November, 1798, he writes:—

> The boy *William* is left under your guardianship, and is directed to be sent to *Scotland* to receive a genteel education, and to be put to such profession as may appear best to suit his genius. He has appropriated a fund, say £400 to £500 sterling, for those purposes, to be at your disposal, and independent of his executors.

This is represented by the Appellants as having been written in furtherance of the conspiracy against Mr. *Shedden*, the Appellant; but they can hardly fasten any imputation of this character upon letters written to and received from *William Shedden's* executors, of whom two, Mr. *James Farquhar*, the friend, and Dr. *Hosack*, the physician, of *William Shedden*, are certainly above all suspicion. Now, Mr. *William Patrick*, writing to them in a letter of the 5th of April, 1860, says:—

> It is only in consequence of my uncle's last request contained in his settlement, and in a letter written to me the day before his death, that I shall endeavour to the best of my judgment (in case you think it advisable to send the boy to *Scotland*), to lay out the money remitted by Mr. *Shedden* to the best advantage for his board and education.

It is hardly possible to believe that Mr. *William Patrick* would have ventured to write in these terms to the executors if he had not received a letter written by *William Shedden* the day before his death, and if there had been no remittance accompanying the letter to be laid out for the board and education of the Appellant.

A still stronger confirmation of the genuineness of this portion of the letter in question is to be found in a letter of the executors to *William Patrick*, dated *New York*, 28th of May, 1800, in which they say:—

> In conformity to the will of our deceased friend *William Shedden*, Esquire, we now send you *per* the ship *Fanny*, *D. H. Braine* master, his son *William* to be brought up and educated under your direction, agreeable to his letter of instructions to you.

Now there is no letter to which these words "letter of instructions"

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can possibly apply but that of the 12th of November, 1798. The executors proceed:—

> The funds transmitted to you at the death of Mr. *Shedden* will, we hope, prove sufficient for his present purposes, and when the affairs of the estate are arranged we will be enabled to say what further provision can be made.

No one, I think, after considering these extracts from the correspondence can reasonably doubt that there was a letter, written by *William Shedden* himself, on the 12th of November, 1798, informing *William Patrick* of his intention to send him his son, the Appellant, remitting to him bills of exchange, and directing them to be appropriated to the Appellant's board and education.

These portions of the letter, however, are of small importance in comparison with the passage in which Mr. *Shedden* is said to have written:—

> I have married Miss *Ann Wilson*, which is approved of by my friends here, and which restores her, and her two fine children I have by her, to honour and credit.

The authenticity of this passage, as having been contained in the original letter, was strenuously denied by the Appellants, and it was alleged by them to have been falsely and fraudulently inserted in the copies called the duplicate and triplicate. But (as already observed) in order to render this serious charge in the slightest degree probable, it is necessary that *John Mills* should have been a party to the conspiracy against the Appellant, and the proof already adverted to, that some part of the contents of the letter must have been faithfully copied, affords some slight security at least to the attestation of *Mills* as to the accuracy and fidelity of the whole of the copies. But in addition to this probable evidence, there are letters written in the lifetime of *William Shedden*, and after his death, which state the facts of the marriage with *William Shedden* and *Ann Wilson*, and the motive for it, in terms exactly corresponding with the statement in the letter of the 12th of November, 1798.

As a matter of course any letters which are in any way adverse to the strong views of their case entertained by the Appellants are treated by them as false and fabricated, or as part of the conspiracy between the writers to render the Appellant illegitimate, and so to deprive him of the succession to his father's estates.

I am bound to say that in my judgment there is not a particle of proof, nor even a shadow of probability, to brand the parties with any fraudulent design upon the inheritance to *William Shedden's* estates, or to render the letters to which I am about to refer in any way suspicious, as not containing a true relation of the circumstances to which they refer.

On the 9th of November, 1798, *John Patrick*, of *New York*, one of the executors of *William Shedden*, and therefore a person possessing his confidence, wrote to *William Patrick* a letter, in which he says:—

> Mr. *William Shedden* has, from considerations which he conceived moral, natural, legal, and proper, at the moment when eternity was staring him in the face, united himself in matrimony to the woman who has for many years lived with him in a very different situation. His object in this proceeding was to rescue from a state of bastardy, and introduce into the world with all the privileges appertaining to these who are born under the influence of the law, two infant children, one a girl of about six years old, the other a boy of about five. The ceremony took place only on the 7th instant; it was to him a hard struggle, but the considerations above mentioned preponderated. I, of course, was not consulted, but he communicated the whole to me after it had taken place with his motives.

And in a letter from the same *John Patrick* to *Robert Shedden*, of *London*, of the 10th of November, 1798, he writes of *William Shedden*:—

> He acknowledged himself guilty of an error, the only one in his life, an unfortunate propensity which you well know. It forced him (on the 7th instant) at the moment when death was before his eyes, to an alternative which he could never have contemplated, an union with the woman that had long been with him in a different situation. His motives in this proceeding were pure, they were dictated by a feeling heart; he conceived it a duty, a moral, a legal, and a natural obligation, to rescue from a state of bastardy, and introduce into the world with all the privileges common to the rest of mankind, two infant children. It was a hard struggle, but the considerations above-mentioned preponderated.

After the death of *William Shedden*, *William Patrick*, of *Virginia*, in a letter to his aunt, Miss *Jean Shedden*, of the 8th of December, 1798, wrote:—

> A few days before his death he (*William Shedden*) married the woman that had lived with him many years, by whom he has two children—a boy and girl—besides which he has another daughter about thirteen years of age. The marriage took place to throw off the stigma from the children. I don't believe it was from much regard to the woman.

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The statements in these letters between members of the family, relating the fact of the death-bed marriage, and the motive which led to it, are of an unsuspicious character, because it is introduced by way of narrative, and apparently not to serve any purpose of the writers. If they were really written in furtherance of a fraudulent and nefarious scheme they display consummate artfulness, as they are made to wear the appearance of entire absence of design.

But there is one letter with reference to this marriage, which the Appellants exercised all their ingenuity in vain to disable. This is a letter written by Mrs. *Vincent*, the widow of *William Shedden* (formerly *Ann Wilson*), nearly a year after his death, when she had become the wife of another man, and, consequently, could neither have had her mind disturbed by recent bereavement, nor have been in a state of unprotected widowhood. The letter is addressed to Dr. *Robert Patrick* on the 3rd of September, 1799, and contains this passage:—

> My chief reason for troubling you at present is owing to a report circulating here that my husband's relations mean to interfere and claim the estate, to the prejudice of the child, on the pretence of illegitimacy. As you are next of kin to Mr. *Shedden*, of course, if a claim of this kind should be set up, it must be from you. The fact is, the marriage was solemnly performed, and the will as regularly executed as any two acts of their nature could possibly require; and ample testimony of the facts, I trust, I have furnished.

There can be no doubt that this passage refers to the death-bed marriage, and speaks of it as a contemporaneous event with the will which was made on the 7th of November, 1798. I shall have occasion to refer to this letter upon another part of the case, but at present I will merely remark that it is not to be got rid of in the summary way in which the Appellants dealt with this and every other letter and document prejudicial to their case, by strong and positive and reiterated assertions of fraud and fabrication. There is nothing to make any dispassionate mind hesitate to believe the integrity of the members of the family in the reference to the marriage of the 7th of November, 1798, in their letters to each other, and the genuineness of the letter of Mrs. *Vincent*, relying upon the fact in support of her children's legitimacy.

But if this is the correct conclusion to be drawn from all the preceding circumstances, what reason can there be for doubting whether the original letter of the 12th of November, 1798, con-

tained the important passage in question, which has such a material bearing upon the whole case of the Appellants.

Sir *Cresswell Cresswell* and Mr. Justice *Wightman* were therefore, in my opinion, perfectly correct in their conclusion, that there was an original letter of *William Shedden* of the 12th of November, 1798, of which the duplicate and triplicate are faithful copies. And I proceed to consider whether they were also right in holding that this original letter had been given to Mr. *Shedden,* and retained by him.

As already observed, *William Patrick* swore that he delivered the original letter to the Appellant in 1823 or 1824, and never received it back again. In confirmation of this fact, a list of papers was produced at the trial, some of which were admitted to have been received by the Appellant. This list, which appears to have been chiefly in the handwriting of *William Patrick* (the two last lines only having been written by the witness *Love,* who produced it), is headed "List of papers sent for perusal of *William P. R. Shedden,* 7th October, 1823." No. 3 of this list is "Newspaper of 14th November, 1798, intimating do." (*i.e.*, Mr. *Shedden's* death), and No. 5, "Letter from him (Mr. *Shedden*) to *William Patrick,* of 12th November, 1798, inclosing two bills of exchange, amounting together to £417 15*s.* 8*d.* sterling," which is the letter in question. Against these two items there is written in pencil, but in whose handwriting was not proved, the words "not returned."

The Appellant swore at the trial that the letter of the 12th of November, 1798, was never in his custody, and that he never saw it nor heard anything of it till the year 1841, when he heard of a copy of it as "duplicate." But in a letter from the Appellant to *William Patrick* of the date of the 3rd of January, 1824, he wrote:—

> On my arrival last night from the west country, I received your letter of the 31st ultimo, and I have to thank you very sincerely for the letter of my father to you, and the obituary. As I have never seen my father's handwriting before, you will easily be assured that this is a dear relic to me, being, perhaps, his last signature in this world.

This language certainly applies very closely to a letter written by *William Shedden* on the 12th of November, 1798, the day

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before his death. The letter of the 31st of December referred to by the Appellant in his letter of the 3rd of January, 1824, was not in evidence. The Appellant swore it was not in his possession. Had it been produced it probably would have proved what letter it was which was sent with the obituary. In the absence of any such reliable information on the subject, the Appellant stated that

> A letter of his father's of no consequence, written probably five or six days before his father's death, was given to him by *William Patrick*, that he had this letter in his possession not more than twenty-four hours, and that *William Patrick* came again and said he would give him another of his father's signature, and gave him one of the 17th April, 1783.

Now, neither of these letters can possibly refer to the letter which was sent to the Appellant in *William Patrick's* letter of the 31st of December; nor to the one of the 17th of April, 1783, because of course it was not the last signature of *William Shedden;* nor to the one referred to as having been in the possession of the Appellant not more than twenty-four hours, because he speaks of the letter sent to him as "a dear relic," which imports that it was something which he was to retain in his possession. Besides, the tenor of the Appellant's letter of the 3rd of January, 1824, evidently points to some matters with which he had recently become acquainted, and which had occasioned him great unhappiness, for he says:—

> Since my return, the circumstances which have been communicated, and the matters which have been unfolded to me, have proved a source of continued misery, and all the pleasure and happiness which I expected to find has been turned into the greatest pain.

There is no circumstance to which this can be taken to refer except to the knowledge of his illegitimacy acquired by the Appellant about this time, which the letter of the 12th of November, 1798, would prove to him, but not the letter (according to his description of it) which the Appellant had in his possession for twenty-four hours, and which was exchanged for the letter of 1783.

Upon the conflict of evidence as to this letter between the Appellant and *William Patrick*, I have arrived at the conclusion that the letter of the 12th of November, 1798, was in the possession of the Appellant and retained by him. Whether it was amongst the

list of papers sent to him for perusal on the 7th of October, 1823, or in the letter of the 31st of December, 1823, is not very material. It is possible that having been sent with the other papers for perusal in October, after having been in the possession of the Appellant for twenty-four hours, it was returned and again sent to him in the letter of the 31st of December. This is rendered even probable by the fact that the Appellant in his evidence at the trial stated that *William Patrick* must have sent him the obituary in October, 1823 (which is confirmed by its being in the list of papers sent for perusal at that date), and yet in the letter of the Appellant of the 3rd of January, 1824, he thanks *William Patrick* for the obituary as well as for his father's letter, both of which he had received with *William Patrick's* letter of the 31st of December. It would appear from these circumstances as if the letter of the 12th of November, 1798, and the obituary, had been originally sent for perusal in October, 1823, and that both of them being returned were sent again in December, 1823, and that when the list of the 7th of October, 1823, came afterwards to be examined, and these two documents were not found amongst the papers sent at this time, the words "not returned" were placed by some one in ignorance or forgetfulness of the fact, that as far as concerned the list itself this was not correct. However this may be, I entertain no doubt upon the evidence that Sir *Cresswell Cresswell* and Mr. Justice *Wightman* were right in their opinion that the original letter of the 12th of November, 1798, was sent to the Appellant in *William Patrick's* letter of the 31st of December, 1823, and was retained by him.

For a very long series of years the rights of all parties were supposed to depend upon the effect of the marriage of the Appellant's father and mother on the 7th of November, 1798; and no one appears to have imagined that his claim to the succession to his father's estates could be rested upon any other ground. The family at first seem to have been under the impression that the death-bed marriage would have had the effect intended by *William Shedden* of legitimating the children, and they expressed some displeasure at it. However, they very soon took steps to ascertain the law upon the subject; and by the desire of *William Patrick* a case was laid before American counsel for their opinion, "Whether

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by the law of *New York* the marriage was sufficient to legitimate children previously born, and to entitle them to all the privileges of lawful children." To which the following answer was given on the 20th of May, 1799:—

If Mr. *Shedden* apprehended the children antecedently born would become legitimate in consequence of the marriage he was so far mistaken, the law of the State corresponding with that of *England* upon the point in question.

The Appellant's legitimacy being thus at least questionable, and if he had no legal claim to his father's estates, Dr. *Robert Patrick*, the nephew of *William Shedden*, was his heir-at-law, Mr. *William Patrick*, in October, 1799, procured his brother to be served heir to the estate of *William Shedden* in *Scotland*. A great deal was made by the Appellants of the alleged injustice of this proceeding, and of the manner in which it was conducted. But although it would have been a generous act on the part of Dr. *Robert Patrick* to have given up his claim to *William Shedden's* estates in favour of the Appellant, there was nothing in the circumstances of the case to call for such an act of generosity; and the proceeding differed in no respect from the ordinary character of a service as heir, nor can any suspicion fairly and justly attach to it unless it can be concluded that all which had previously occurred was the result of fraud and contrivance; for which, as already observed, there is no colour or pretence except in the prejudiced imaginations of the Appellants.

There was not the slightest attempt to conceal this proceeding from the persons whose duty it might be considered to be to defend the rights of the Appellant. The service was *expede* in October, 1799, and on the 5th of April, 1800, *William Patrick* wrote to the executors of *William Shedden* a letter, in which he said:—

Being at present obliged to act as factor and commissioner for my brother, Dr. *Robert Patrick* of *Treehorn*, the heir-at-law to the late Mr. *William Shedden's* landed property in *Scotland*, I cannot accept of the appointment of guardian to *William Patrick Shedden*, the son born to the late *William Shedden* by *Ann Wilson*, nor can I take charge of his affairs in this country, being obliged to attend to the interest of my brother, which may in some respects be considered as different from that of the boy.

In the following month the executors, in conformity with the will of *William Shedden*, sent the Appellant to *William Patrick*,

and in their letter of the 28th of May, 1800, announcing the fact, they say:—

> We take this opportunity to request that you will communicate with us on the subject of the estate in *Scotland*, its value, in what manner by the laws of *Scotland* it descends, and in general to furnish us with every information respecting the operation of the laws of *Scotland* on the will, the legitimacy of the children, and in general with every information necessary to guide us in the exercise of our duties as executors.

*William Patrick* accordingly, on the 18th of September, 1800, wrote a very long explanatory letter to the executors, in which he told them that the marriage of *William Shedden* and *Ann Wilson* did not confer the privileges of legitimacy on their children. That the children being illegitimate in *America*, could not take property in that country by descent, but only by will. That *William Shedden's* will could not affect to convey the property in *Scotland*, because it was not conceived in a form sufficient to convey Scotch landed property, and it was executed on death-bed, and was therefore reducible by the heir-at-law. He told them that he had taken the opinion of lawyers in *Scotland* as to whether the children, being illegitimate in *America*, must not be held to be illegitimate in every part of the world, and that they seemed to think the landed estate in *Scotland* must descend to his brother. And he added:—

> At the same time it is fair and candid to inform you that, as the point has never been tried by the Courts here, it cannot be considered as clear that the children are to be held as illegitimate in this country. It involves a question of considerable intricacy, which, as guardians for the children, I do not think you can avoid bringing to trial by putting in a claim to the landed property in the Courts of *Scotland*.

Dr. *Robert Patrick* also, in a letter to *John Patrick*, one of the executors, in December, 1800, writes:—

> I understand from *William* he has applied to the executors to have the point about the succession finally settled by a decision of the Court of Session. I wish you would push this as much as possible, as it is equally a thing of the greatest importance for the children and me.

And again, in a letter of the 29th of March, 1801, Dr. *Robert Patrick* writes to *John Patrick*:—

> I request that you will use every means as one of the executors to get them to agree to appoint a commissioner for the boy in this country, and authorize him to

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employ agents and counsel in the Court to have the question of succession decided. Of course some relation of Mr. *Shedden's* in this country would be the most proper person, who would attend to the conduct of the agent, and see everything conducted for his interest. . . . And as my brother agrees to pay the expense of both parties out of the rents of the estate, it becomes very much the interest of the boy to get the question decided.

He afterwards writes:—

I trust you will be able soon to send *William* the act of the executors appointing a commissioner for the boy. Certainly one of Mr. *Shedden's* relations is the most proper for this, and Mr. *H. Crawfurd* is now among the nearest, and besides is the most intelligent, a man of the most respectable character, and one who would interest himself to see justice done to both parties. If you do not approve of him, Mr. *William* and *John Fullarton* are the only near relations, but they are not so likely to take an active part. Mr. *John Shedden* of *Crawfield* is almost the only other relation, and very likely to attend to the business.

I have referred so largely to these passages in the letters of the *Patricks* because the Appellants, invariably attributing fraud to every act opposed to their interests, and to the parties engaged in it, have not scrupled to charge the selection of Mr. *Hugh Crawfurd* to be the factor *loco tutoris* to the Appellant, as part of the management and contrivance of the *Patricks* to defeat the rights of the Appellant and secure the succession to themselves. They over and over again insisted that Mr. *Crawfurd* was wholly unfit for this office, and incapable of acting impartially in it, as he was dependent upon *William Patrick*, and a mere instrument to serve his purposes; and that he conducted the proceedings in the reduction suit in such a manner that the real facts and circumstances in favour of the Appellant's case were concealed, and thereby a decree adverse to him was obtained. But it clearly appears that both Dr. *Patrick* and *William Patrick* were most anxious that the defence of the rights of the Appellant should be undertaken by some one wholly independent of themselves, and they urgently and repeatedly entreated the executors to discharge a duty which properly belonged to them.

The executors having declined to take any steps in the matter, it was necessary, if a suit were to be instituted to assert the claim of the Appellant to his father's estates by descent, that some one should be appointed to prosecute such suit. And upon a petition presented to the Court of Session, Mr. *Hugh Crawfurd* was duly appointed factor *loco tutoris* to the Appellant. I am bound to say

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that there does not appear to be the slightest foundation for the strong observations made by the Appellants on the character and conduct of this gentleman. Immediately after his appointment to his office Mr. *Crawfurd* brought an action for reduction of the service *expede* by Dr. *Robert Patrick*, on the ground that the Appellant was the only lawful son of the deceased *William Shedden*, and the only person entitled to be served as his nearest and lawful heir. The case was argued in the Court of Session, and that Court repelled the reasons of reduction and decreed against the claim of the Appellant. Mr. *Crawfurd* appealed from this decree, and your Lordships' House gave judgment that the Petition and appeal be dismissed, and the interlocutor complained of be affirmed.

There is no report of the reasons of the judgment in this House, Lord *Eldon* stating that it was not usual to give any reasons for affirming the judgment of the Court below. But there is no ground for supposing that all the circumstances of the case in favour of the Appellant were not brought fairly before the Court of Session and the House of Lords in that suit.

The case of the Appellant upon the appeal to this House was prepared by Lord *Brougham*, then at the Bar, and displays all the acuteness and ingenuity for which he was so eminently distinguished. And in his judgment upon the appeal in the case of *Shedden* v. *Patrick*, in the year 1854 (1), he said :—

> It is undeniable that that case, which was then called *Crawfurd* v. *Patrick* (Mr. *Crawfurd* being the Pursuer in the case), underwent great argument in the Court below, and was afterwards fully discussed at the Bar here, and disposed of by this House, affirming the interlocutors of the Court below, and in substance declaring Mr. *Shedden*, the infant then, the present Appellant, to be not legitimated to the effect of obtaining the Scotch estate, to be not legitimated by the marriage of his parents contracted subsequently to his birth in *America*, where the Scotch civil law of legitimation by subsequent matrimony does not prevail.

This judgment of the House of Lords was delivered in 1808, and no endeavour was made to impeach it until forty years afterwards. It was said in argument that the Appellant, being an infant at the time, was ignorant of the proceedings taken on his behalf in the reduction suit. But he knew of his alleged illegitimacy in January, 1824; he knew also of the service of Dr. *Robert Patrick* as heir in

(1) 1 Macq. 622.

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special to his father's Scotch property, and it is impossible to doubt that at this time, when he was twenty-nine years of age, he must have known of the proceedings for reduction of that service, and of the establishment of its validity by the judgment of this House; yet he took no steps to question the propriety of the judgment, or to impeach the title of the *Patricks* to the Scotch estates, till the year 1848, when he brought an action of reduction and declarator in the Court of Session in *Scotland* to set aside the proceedings.

In his original summons of the 22th of February, 1848, and his supplementary summons of the 25th of April, 1849, the Appellant proceeded upon the marriage of his father and mother on the 7th of November, 1798, which he alleged was effectual to legitimate him, and entitle him to succeed to the heritable estate of his father in *Scotland*. And he sought to set aside the decreet and judgment in the reduction suit, on the ground of their having been obtained by fraudulent misstatements and fraudulent concealment of facts, and by gross fraud and collusion on the part of *William Patrick*, Dr. *Robert Patrick*, and *John Patrick*, acting in concert with each other, and in pursuance of a fraudulent conspiracy to deprive the Appellant of the succession to his father's property.

In the original summons of 1848 the Appellant thus stated his case:—

> It was during this last temporary residence in *New York* that he (*i.e. William Shedden*) formed an intimacy and connection with Miss *Ann Wilson*, mother of the Pursuer, *William Patrick Ralston Shedden*, and of which connection there were born the Pursuer and a daughter. With the special view and avowed purpose of legitimating the Pursuer and his sister, the Pursuer's said father married the said *Ann Wilson*, the Pursuer's mother at *New York*, on or about the 7th of November, 1798.

And he charged the Defender, *William Patrick*, with having "carefully suppressed certain letters," and amongst them the letter of the 12th of November, 1798. In his revised case the Appellant stated that:—

> While residing at *New York*, *William Shedden* married the Pursuer's mother on or about the 7th of November, 1798; and that, being at the date of the marriage a domiciled Scotchman, the marriage had the effect of legitimating the Pursuer, and indeed, as will appear from Mr. *Shedden's* own letters, the main object of the marriage was the legitimation of the Pursuer and his sister.

The Appellant therefore in this proceeding relied originally on the marriage of the 7th of November, 1798, and upon the proof of it contained (amongst others) in the letter of the 12th of November, 1798, which he accused *William Patrick* of suppressing.

But in 1851, the Appellant having obtained leave to file a supplementary summons, set up an entirely new case, and alleged a marriage of his parents prior to the one on which he had down to this time wholly relied, and prior to the birth of the Appellant and his sister. After stating the marriage of the 7th of November, 1798, his summons proceeded:—

> Besides his regular marriage publicly solemnized as now mentioned, the said *William Shedden* (although he had not acquired a domicil in *America*) and Miss *Wilson* had been, according to the law of *America*, where they resided, married persons, prior to and at the birth of the Pursuer, inasmuch as they had, previous to that event, as well as afterwards, lived and cohabited together as man and wife, acknowledged each other as such, and were held and reputed as such by their friends, neighbours, and acquaintances; and the said *William Shedden* afterwards got his marriage publicly and regularly solemnized, in order the more certainly to secure and place beyond doubt the legitimacy of the Pursuer and his sister.

It is impossible not to view with some suspicion a case thus brought forward for the first time at so late a period of the dispute between the parties, and so inconsistent with what had been previously alleged in the same proceeding, that the marriage of the 7th of November, 1798, was "with the special view and avowed purpose of legitimating the Pursuer and his sister," born of a previous intimacy and connection of their parents.

The Appellant endeavoured to explain away the extraordinary circumstance of this alleged prior marriage never having been brought forward before, in a Petition presented to the House of Lords in 1854, in which he says:—

> Your Petitioner first became aware of the civil contract of marriage between his father and mother in the month of October, 1849, when in *New York*, and he then, with the assistance of eminent lawyers in that State, collected the most satisfactory and conclusive evidence of the marriage of his father and mother previous to the birth of his sister, who was born before your Petitioner.

But this statement that the Appellant, in the year 1849, first acquired the knowledge of an earlier marriage of his parents than the one upon which he had been all along relying is, to say the least of it, not very correct. For in a letter which is in evidence,

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written by the Appellant to *William Patrick* on the 14th of June, 1839, he says:—

I am not able just now to establish my father's first private marriage, which I have given you notice of; what is known already would not be in your favour; and I conceive it to be my duty now to inform you that my sister told me that it was really the case that my mother was a respectable young person, living with her parents upon a small farm on my father's land, and he did not acknowledge her publicly on account of her humble birth, but nevertheless he always treated her as his wife, and Mr. *Robert Shedden* informed me that he found her at the head of my father's table when he went to *America*, which is not against the statement. Moreover, my sister told me in 1829, when she mentioned these circumstances, that a woman was still alive who was present at the first private marriage. As for the truth of the thing, I can only say that my sister believed it, and I can depend upon her veracity.

The Appellant, when he commenced his proceedings in 1848, could not have placed much reliance upon this supposed prior marriage, of which he heard in 1829, as the terms of the letter of the 12th of November, 1798, which he vouched for proof of the marriage of the 7th of November, 1798, are inconsistent with the idea of such prior marriage. Intending, therefore, originally to rest his case upon the marriage of the 7th of November, 1798, of which the letter of the 12th of November furnished conclusive evidence, he charged *William Patrick* with having "carefully suppressed" that letter. But after the suit had been pending about three years, it seems to have occurred to the Appellant, or to have been suggested by his legal adviser, that the cohabitation of his father and mother prior to his birth might be evidence of a marriage having taken place between them at this earlier period. Accordingly, he introduced into his supplementary summons the allegation that his parents "were married persons prior to and at his birth," as a fact *noviter veniens ad notitiam*. To this case thus brought forward, however, the letter of the 12th of November, 1798, upon which he proposed at first to rely, would have been utterly destructive, and the Appellant, therefore, no longer charged *William Patrick* with having "carefully suppressed" it, but in his condescendence he stated that:—

In 1841 *William Patrick* sent a letter to the Pursuer's former agent, Mr. *William Hunt*, bearing date 12th November, 1798, and purporting to be an original document, on the express condition that it should not be given to the Pursuer, nor leave Mr. *Hunt's* custody. This original letter was returned by Mr. *Hunt* to

Mr. *Patrick*. And again, the Defender *William Patrick* transmitted to the Pursuer's agent a copy of a letter alleged to have been received by him from Mr. *Shedden*, and purporting to be dated the 12th November, 1798. The original of this letter has, however, never been exhibited, and the Pursuer does not admit that the alleged duplicate and triplicate produced are correct or authentic, or that the late Mr. *Shedden* ever signed or wrote such a letter.

The Appellant thus endeavoured to reconcile his case as originally presented to the Court and the new one contained in the supplementary summons with each other. And while not denying that there had been in existence a letter of the 12th of November, 1798, purporting to be an original document (which he could hardly have done after his former statements), he insinuates, rather than asserts, that the duplicate and triplicate produced are not correct copies, as their contents would be fatal to his alleged newly-discovered case.

The statement in the condescendence above referred to is evidently intended as an allegation that the Appellant never knew of the letter of the 12th of November, 1798, until the year 1841, which he also swore at the trial. It is quite true that *William Patrick* did deliver to Mr. *Hunt*, in 1841, various papers, and amongst them, "Letter (duplicate), *William Shedden* to *William Patrick*, dated at *New York*, 12th November, 1798," which was returned by Mr. *Hunt* to *William Patrick* in August, 1842. But it is not true, as sworn by the Appellant at the trial, that he never heard anything about this letter before 1841, when he had a copy of the alleged letter as duplicate; for, in addition to all the evidence of the original letter having been in his possession in January, 1824, in his letter of the 14th of June, 1839, writing with reference to the opinion obtained from the American lawyers as to his legitimacy, he says:—

> And just to think of your seeking for an American certificate, when you had received my father's own letter telling you of his marriage with my mother.

In the action of reduction and declarator, nothing was determined with respect to the marriage or marriages of the Appellant's father and mother, or as to his legitimacy. The case proceeded entirely on the ground of fraud, by which it was alleged the decreet of the Court of Session in 1803, and the judgment of the House of Lords affirming it in 1808, were procured. The Court of

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Session decided that no ground had been laid for impeaching the proceedings taken for reduction of the service of Dr. *Robert Patrick* as heir to *William Shedden*. And the House of Lords held that the Court of Session was right in rejecting the application for reduction, as no fraud had been stated or proved which rendered it competent to the Pursuer to reopen the question. These early proceedings, therefore, stand unimpeached; and the question of the legitimacy of the Appellant, so far as it is founded on the marriage of his parents on the 7th of November, 1798, was then finally determined against him.

Thus matters stood at the time of the passing of the *Legitimacy Declaration Act*, 21 & 22 Vict. c. 93, on the 2nd of August, 1858. The Appellants lost no time in availing themselves of its provisions, and on the 22nd of December, 1858, they presented their petition to the Judges of Her Majesty's Court for Divorce and Matrimonial Causes.

It would have been hopeless, after all that had occurred, to attempt to establish the legitimacy of Mr. *Shedden* upon the marriage of the 7th of November, 1798, and therefore the Petitioners prayed the Court to pronounce that *William Shedden* and *Ann Wilson* were lawfully married prior to the birth of the Appellant *William Patrick Ralston Shedden*, and that he is their legitimate son and heir, and a natural-born subject of Her Majesty. The only question, therefore, which the Court below had to determine (which was completely lost sight of in the lengthened arguments of the Appellants) was, whether there had been a marriage of the parents of the Appellant prior to his birth. The claim of the Appellant to be declared legitimate was placed upon no other ground.

Evidence was given by members and friends of *William Shedden* and his family of the position of *Ann Wilson* in the household of *William Shedden*, of her sitting at the head of his table, of their being always reputed to be man and wife, and being visited as such by respectable families in their neighbourhood. It was contended by the Appellants that proof of this description, which in *Scotland* is called habit and repute, in *New York* constituted actual marriage. But from the opinions of American lawyers produced at the trial it appears that the law of *New York* is precisely similar

to that in *Scotland*, and that habit and repute are merely evidence of marriage, and not one of the modes by which marriage is constituted. If the case of the Appellants had rested upon this description of proof without anything to oppose to it, it would have been conclusive in favour of an actual marriage having taken place between the parties. But the presumption arising from cohabitation and acknowledgment was completely rebutted by evidence on the other side of the strongest character.

The presumption in favour of this earlier marriage was rather shaken even in the course of the Appellants' evidence. For in order to account for the marriage having been a private and unacknowledged one it was stated that the father of *Ann Wilson* objected to the match, because "Mr. *Shedden* was too old, old enough to be her father." But if this had been the motive for keeping the marriage secret, it is difficult to understand how Mr. *Wilson* could be satisfied with the cohabitation of the parties while the fact of their actual marriage was kept from him. A totally different reason, however, is assigned for the absence of any public acknowledgment of the marriage in the letter of the Appellant of the 14th of June, 1839, before referred to, in which he says:—

> My sister told me it was really the case that my mother was a respectable young person, living with her parents upon a small farm on my father's land, and he did not acknowledge the marriage publicly on account of her humble birth, but, nevertheless, he always treated her as his wife.

These different explanations of the admitted fact of the alleged marriage being private and unacknowledged are calculated to raise some doubt as to the accuracy of the recollection of the witnesses who gave evidence of habit and repute.

But whatever might have been the just conclusion to be drawn from this evidence if it had stood alone, the effect of it is altogether destroyed by the letter of the 12th of November, 1798, the contents of which have been shewn to be faithfully copied in the duplicate and triplicate produced in evidence. If there had been a previous marriage between *William Shedden* and *Ann Wilson*, it is impossible that he could have written as he did in that letter:—

> I have married Miss *Ann Wilson*, which is approved of by my friends here, and which restores her and her two fine children I have by her to honour and credit.

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If they had been married before the birth of the children, where was the necessity for another marriage to restore the wife and children to honour and credit? The Appellants acknowledge the conclusive effect of this letter upon the case set up in their Petition, by their strenuous but vain efforts to discredit the authenticity of this passage, and by their strong and often-repeated assertion that its insertion in the duplicate and triplicate was the result of the fraud and contrivance of the *Patricks*.

But the evidence against the fact of the previous marriage alleged in the Petition does not rest here. The letter of Mrs. *Vincent*, formerly *Ann Wilson*, of the 3rd of September, 1799 (which I have already referred to), is equally decisive against the case of the Appellants in the Court below. Mrs. *Vincent* is writing to Dr. *Robert Patrick*: "Owing to a report that her husband's relations meant to claim the estate in *Scotland* on the pretence of her child's illegitimacy." Of course no one could know better than herself whether there had been a marriage between her and *William Shedden* before the birth of her children. And she could easily have dispelled all doubt as to their legitimacy by at once stating the fact of this marriage, which at that time, if it had ever taken place, there would probably have been no difficulty in proving. Instead of this obvious mode of setting at rest all question upon the subject, she relies solely upon the marriage contemporaneous with the will, and says: "The fact is, the marriage was solemnly performed, and the will as regularly executed, as any two acts of their nature could possibly require, and ample testimony of the facts I trust I have furnished."

Upon the evidence, therefore, before the Court below I entertain no doubt that the Judges came to the right conclusion that *William Shedden* and *Ann Wilson* were not married prior to the birth of the Appellant and his sister, and that the Appellant was not their legitimate son and heir, nor a natural-born subject of Her Majesty.

I proceed to consider whether the Appellants are entitled to a new trial on the ground of the rejection of evidence which ought to have been admitted, or the admission of evidence which ought to have been rejected. In order to lay the foundation for objections of this kind it is necessary to shew that the question proposed to be put was formally tendered to the Judges, and rejected by

them, or that the evidence admitted was received after having been objected to.

The only authentic information as to the admission or rejection of evidence is the Judge's notes. From them it appears that some declarations of members of the family were rejected as having been made *post litem motam*. It was argued by the Appellants that the rejection of these declarations was improper, because the previous *lis* or controversy upon the ground of which they were excluded was not upon the very point which was in contest in the case then before the Court. But in all the litigation which has taken place, and which commenced long prior to any of the declarations offered in evidence, the question in dispute was the legitimacy of the Appellant. The subject matter of controversy was the same throughout, although the ground upon which it was originally placed was changed during the litigation. No declaration of the legitimacy of the Appellant offered in evidence was properly admissible.

The Appellants tendered in evidence certain extracts from *Lloyd's* books to shew that only two vessels arrived from *New York* at *Greenock* between certain dates. It was proved that *Lloyd's* lists contain a report of the arrival and departure of vessels, which is printed from letters received daily from agents at the different ports. The Court very properly rejected this evidence, as the books could not be of higher authority than the letters from which the entries were made, and the letters themselves clearly would not have been admissible.

The Appellants complained of the rejection of *William Shedden's* ledger, which was made up by his executors after his death. But it would have been contrary to one of the commonest rules of evidence to allow the account books of one person to be read in evidence against another who was a stranger to their contents.

The Appellants objected to the refusal of the Judges to permit Miss *Jean Ralston Shedden* to be re-called to make some additions to her evidence previously given. The permission to recall a witness is entirely in the discretion of the Judges, a discretion usually exercised with great caution, on account of the obvious danger of the proposed evidence being skilfully applied to supply any deficiencies which might have been left in the case upon the former

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proofs. I think the Judges exercised a very sound discretion in refusing to allow Miss *Shedden* to be re-called towards the close of the case for the Petitioners.

There were two or three letters rejected which call for no particular remark, as they were too obviously inadmissible to raise any doubt as to the propriety of their rejection.

The Appellants complained of the admission in evidence of the depositions of *John Barr* and *William Neilson*, taken under a commission issued in the action of reduction and declarator in the Court of Session in 1848, in which no record was made up or closed. It is unnecessary to consider whether the examination of witnesses in a cause between the same parties or their privies, in which both parties took part by examination and cross-examination, would not be evidence against them both in a subsequent litigation, because it does not appear that any objection was made to the reception of these depositions, but they were read apparently without any observation as to their admissibility.

It has not been shewn that any evidence was either admitted or rejected which would entitle the Appellants to a new trial.

With respect to the application for a re-hearing, founded upon affidavits of the Appellants, which was unanimously refused by the Court, it is unnecessary to offer many observations. The affidavits, which were of a most irregular and unusual character, consisted partly of attacks upon the characters of some of the witnesses, and of contradiction to their testimony, asserted to be proveable by documents and conversations, partly of arguments upon the evidence before the Court at the trial, to shew that the Judges had come to an erroneous conclusion, and, lastly, of allegations of being taken by surprise at the evidence produced at the trial, and of statements of new evidence in the possession of the parties, and of additional evidence which had not been, but which might be obtained by them. With respect to the grounds of application founded upon the impeachment of the credit of the witnesses, and upon the alleged erroneous view of the facts of the case taken by the Judges, these were not the proper subjects of affidavits; but they ought to have been argued solely upon what was presented to or appeared before the Court at the trial. It was for the Judges to decide upon the credit due to the witnesses from their demeanor, as well

as from the evidence which they gave, or which was offered against them; and if there were circumstances to impeach their credit which might have been produced at the trial, but which were not brought forward, the Appellants could not be allowed another opportunity to rectify this omission. The Appellants had no right to make their affidavits a vehicle for reasoning the case as to the alleged miscarriage of the Judges. They could only regularly take the evidence as given at the trial, and argue from that evidence against the conclusions at which the Court arrived. As to the suggestion of further evidence than that produced at the trial being, at the time of swearing the affidavits, in the possession of the Appellants, and of other evidence being obtainable which was not then obtained, the Judges were quite right in refusing a re-hearing upon these grounds. It is an invariable rule in all the Courts, and one founded upon the clearest principles of reason and justice, that if evidence which either was in the possession of parties at the time of a trial, or by proper diligence might have been obtained, is either not produced, or has not been procured, and the case is decided adversely to the side to which the evidence was available, no opportunity for producing that evidence ought to be given by the granting a new trial. If this were permitted, it is obvious that parties might endeavour to obtain the determination of their case upon the least amount of evidence, reserving the right, if they failed, to have the case re-tried upon additional evidence, which was all the time within their power. The learned Judges were so clear as to the affidavits not furnishing sufficient grounds to entitle the Appellant to a re-hearing, that they did not require any answer from the other side, but refused even a rule to shew cause why there should not be a re-hearing; and I do not see the slightest reason to doubt the propriety of the determination at which they arrived.

The appeal must be dismissed, and with costs.

LORD COLONSAY:—

My Lords——

Miss *Shedden*:—My Lord, I protest against you as a Judge, you having been the *Patricks'* counsel and an avowed partizan. We

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did so before, and we put our protest here before God and our country on record.

LORD COLONSAY:—My Lords, this case has been regarded and treated by the Appellants, not unnaturally, I think, as one to them of deep interest and paramount importance.

Miss *Shedden*:—As one of life and death, my Lord, and the *Patricks'* own counsel is our murderer.

THE LORD CHANCELLOR:—I must really enforce the order for your removal, Miss *Shedden*, if you continue these interruptions.

LORD COLONSAY:—The Appellants have pleaded the cause personally at your Lordships' Bar, and at unusual length, as not unfrequently happens when parties plead their own cause, diverging sometimes into matters that are irrelevant, and sometimes indulging in unnecessary repetition——

Miss *Shedden*:—We were refused counsel; they would not even defer the case for three weeks.

LORD COLONSAY:—But I listened to the argument with patience, and I think that in the course of that argument nothing was omitted that could have been advanced in support of the case as it presented itself to the minds of the Appellants. I say this, not only having regard to the argument itself, but from the examination which I have subsequently made of the voluminous materials which are now before us. Applying myself to these materials, which was a task somewhat tedious, and at the same time, I may say, not uninteresting, as a judicial search for truth, I have formed my opinion upon certain points, as I separately examined them, and after the judgments which have now been pronounced in detail, I shall do nothing more than enumerate those points in the order in which I expiscated them, and state the conclusions at which I have arrived.

The first point was whether a trial by jury was matter of right to the Appellants. That is a question of law, it depends upon the construction of certain statutes, and I cannot conceive that any one carefully examining those statutes as a lawyer can entertain a doubt upon that question as to the matter of right.

The next point which I had to consider was whether, not being matter of right, but matter of discretion, that discretion which was vested in the Court had been improperly exercised. I do not think it was improperly exercised. It is not to be presumed that a discretion so vested has been improperly exercised. There must be some strong ground stated against the exercise of it. But I think that it was properly exercised here. I think that looking to the points involved in this cause, and looking to the multitude of documents that were referred to in this litigation, it was a cause better suited to the tribunal which tried it than it would have been for the consideration of a jury. The case was tried and the judgment was arrived at by the Court consisting of three Judges.

The next question which I had to consider, was, whether the judgment so arrived at was a right judgment, or was a judgment that ought to be reversed or altered. I considered that question with reference to the proper record which we have of the evidence —all that I could find that is relevant or competent to be taken into consideration in the printed materials on record—and I have arrived at the conclusion that the judgment was right upon the evidence as it was presented to the Court.

But then there was a motion made for a new trial, and it is demanded that that new trial should be one before a jury. Now, the demand to have a new trial merely in order to have the verdict of a jury is not a good ground for granting a new trial. To obtain first the judgment of a Court competent to try a question, and which has properly and fairly tried it, and then to shift the case from that tribunal to the consideration of a jury, merely in order to take the chance of what might be the verdict of a jury, would be a mode of throwing matters into confusion, and giving rise to difficulties, and leading to endless applications for new trials. But still there are recognised grounds on which new trials may be granted. These grounds are numerous, and I believe there is scarcely one of them that has not been stated as one of the grounds upon which the application for a new trial here is rested.

The first consideration is, whether the verdict, if I may so call the judgment of the Court, was against evidence. That is the same question that I have already alluded to when I said that the Judges had arrived at a right conclusion. Then the next question

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is, was evidence improperly rejected? And the third is, was evidence improperly admitted? Now, to that I have directed my attention very carefully. I did so the more because I thought it was possible that the Appellants arguing their own case might not know or see the full legal force of the objections that might be taken to the admission or exclusion of evidence. But I must say that, after considering that point, I have arrived at the same conclusion with your Lordships, and very much upon the grounds which have been stated by my noble and learned friend who last spoke.

Then there comes the question of surprise, and the further question of *res noviter veniens ad notitiam*. These matters rest upon the affidavits of the parties. Now, as to surprise. I cannot find anything set forth in these affidavits that the law would regard as surprise, and it is only upon matters which the law regards as surprise that a new trial could be granted. As to *res noviter veniens ad notitiam*, I think it is plain upon the face of the affidavits that there is nothing of the kind set forth that would be relevant and competent evidence in the cause. On the contrary, I think it came out in evidence, and in the discussion, especially in the statement which was made to us by the male Appellant in his address from the Bar, that some of the main points now brought forward were matters known to him at a very early period. The law does not consider the mere discovery of a document, or the mere discovery of a fact, to be a matter *noviter veniens ad notitiam*, as giving a right to a new trial. It must be a matter not only that was not, in point of fact, before known to the party, but which the party could not by reasonable inquiry, such as he ought to have made, have put himself in possession of. Now, I see nothing of that kind here. I, therefore, feel that I am forced to arrive at the same conclusion with the rest of your Lordships, with regard to the dismissal of these appeals.

Miss *Shedden*:—There is now pending another appeal in the Court below, in which proceedings are still going on, and we are anxious to have the documents kept in the custody of the House until that appeal is determined. I believe that the other side will not object.

Mr. *Mellish*:—May I ask for your Lordships' order that the documents be given back?

Miss *Shedden*:—We only ask that they should be retained for safe custody till the proceedings in the Court below are over.

THE LORD CHANCELLOR:—These documents were ordered to be deposited with the Clerk of the Parliaments. This case is now disposed of, and has passed from the House.

Miss *Shedden*:—Will your Lordships allow us to have photographs taken of the documents before they leave the custody of the House?

*Ordered*:—That the two documents referred to in the Order of this House of the 27th of May, 1864; also the ledger of *William Patrick*, deceased, referred to in the Order of this House of the 30th of June, 1864; now in the custody of the Clerk of the Parliaments, be returned to the agents for *William Ralston Patrick*, *John Fullarton Patrick*, *James McEwen*, *John Carment*, and *Robert William Cochran Patrick*, certain of the Respondents; they giving a proper receipt for the same.

*Decrees affirmed, and appeals dismissed with costs.*

Solicitors for the Appellants: *Clayton, Cookson, & Wainewright.*
Solicitors for the Respondents: *Loch & McLaurin.*

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*Entail of a Pro Indiviso Share.*

*Per* THE LORD CHANCELLOR:—An estate in tail may properly be created under the Act of 1685, in a share held *pro indiviso* of land.

*Per* LORD COLONSAY:—Holding that an estate possessed *pro indiviso* is within the ordinary meaning of the Act of 1685, upon what authority is it described as incapable of being entailed? I know of none.

*Effect of Subsequent Division.*

An entail of lands held *pro indiviso* is not disturbed by the subsequent division and allocation of the property.

*Per* LORD COLONSAY:—The contingency of subsequent division is no objection; and when the division takes place it is not necessary that there shall be dispositions by the several parties to each other. I hold that to be clear. The feudal right remains on the original infeftment, just as it did before the division.

The partition ascertains and delineates the boundaries. It does not change the land which forms the subject matter of the entail.

*Per* THE LORD CHANCELLOR:—The Appellant contends that new deeds were necessary on the division of the property. But after the division the lands are not different. The Sheriff simply delivers to each owner his own share by his own title; and it requires no concurrence on the part of the other owner, by way of deed or instrument, to effectuate the transaction.

*Per* THE LORD CHANCELLOR:—It struck me at one time that there might be something in the argument that the register did not after division give notice of the title on which the whole is held; but I think that all parties concerned, having notice of the entail of the moiety held *pro indiviso*, must be taken to know that such moiety was subject to the law which renders the whole property divisible; and, therefore, that an entire separate interest may be at any time allocated out of the whole to the heir in tail.

*Prohibitory, Irritant, and Resolutive Clauses—Reasonable Construction.*

Commentaries by the Law Peers, concurring with the Court below, to the effect that the words used in the prohibitory, irritant, and resolutive clauses of an entail were, upon a reasonable construction, sufficient to satisfy the requirements of the Act of 1685.

THE Appellant, as trustee of the sequestrated estate of *James Rocheid* formerly of *Inverleith* the Respondent's great grandfather, instituted the present suit to have it found and declared that the entail in the pleadings mentioned was invalid, and that the estate in question had consequently been held by the late bankrupt

in fee simple—that is to say, subject to the demands of his creditors under the Scotch Bankruptcy Statutes of 1856 and 1857.

The entail was executed in 1749 by *Elizabeth Rocheid*, daughter of Sir *James Rocheid*, she being at the time *pro indiviso* proprietor of one-half of her father's estates in the sheriffdoms of *Edinburgh* and *Berwick;* while her sister and nephew were the owners in fee simple and *pro indiviso* of the other two-fourths; the entail affecting only the unascertained moiety of *Elizabeth*.

The entail was impeached on the following grounds:—1. That the subject of it was but a *pro indiviso* right held in joint ownership, and incapable of being validly entailed. Moreover, it appeared that decrees of division had been pronounced, and that specific partitions had ensued, without any steps taken to secure the operative continuance of the entail. 2. That the prohibitory, irritant, and resolutive clauses were not so framed as sufficiently to constitute the fetters of a strict entail in a question with creditors, though they possibly might be binding *inter hæredes*.

The Respondent, on the other hand, insisted that the maker of the entail, as owner of a *pro indiviso* half of the estate in question, was entitled to entail it under the Scotch Statute of 1685, c. 22; and that the entail was undisturbed by the subsequent partitions. The Respondent maintained, secondly, that the prohibitory, irritant, and resolutive clauses were in all respects valid.

The First Division of the Court of Session, on the 31st of January, 1868, decided (1) that the entail was "valid and effectual."

In arriving at this decision the Court relied much on the case of *Stewart* v. *Nicolson* (2)—a case much considered in 1859 by the First Division, who ruled that "a *pro indiviso* share of an estate may be validly entailed;" and, further, that an entail so made "stands good after a decree of division, without any disposition giving effect to such decree and entered on the register of tailzies."

Mr. *Howden* appealed to the House, and had for his Counsel the Lord Advocate (3), Mr. *Anderson*, Q.C., and Mr. *Pearson*, Q.C.

Sir *Roundell Palmer*, Q.C., Mr. *Gordon*, Q.C. (4), and Mr. *Marshall*, appeared for the Respondent.

(1) See 3rd Series, vol. vi. p. 305.
(2) 2nd Series, vol. xxii. p. 73.
(3) Mr. *Moncreiff*, now Lord Justice Clerk of *Scotland*.
(4) Formerly Lord Advocate.

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The following opinions were delivered by the Law Peers:

THE LORD CHANCELLOR (1):—

My Lords,—The Appellant, as sustaining the rights of the creditors of *James Rocheid*, whose estate was under sequestration at his decease, seeks by this action to have it declared, as against the Respondent, that the deed of entail under which the estate of *Inverleith* is alleged by the Respondent to be held, did not during the possession by the bankrupt, and does not now, constitute a valid and effectual tailzie, pursuant to the Act of 1685.

The history of the devolution of the property is as follows:—Sir *James Rocheid*, some time before the year 1749, was the owner of estates at *Inverleith*, in the county of *Edinburgh*, and *Darnchester*, in the county of *Berwick*, which on his death descended to his his four daughters. *Elizabeth*, one of them, acquired another fourth part in addition to her original share before making the disposition on which this case mainly turns. Her sister, Lady *Kinloch*, held one other fourth part; and her nephew, Mr. *Cathcart*, the remaining fourth part. All these shares were held *pro indiviso*.

On the 14th of January, 1749, *Elizabeth Rocheid* entailed, or purported to entail, upon *Alexander Kinloch* (third son of Sir *Francis Kinloch* by the above-mentioned Lady *Kinloch*) and the heirs whatsoever of his body, whom failing, to other heirs specified in the deed, all and whole her equal half or two fourth parts of the property therein described, being the lands at *Inverleith* and *Darnchester* which had descended from her father. The deed contained numerous conditions and provisions, amongst others the usual name and arms clause with reference to the name of *Rocheid*, and also provisions against altering the destination of the estate, and against burdening the property or allowing it to be burdened.

An objection has been raised to this deed of entail on the ground that the resolutive clause is not co-extensive with the irritant clause.

The irritant clause declares that in the event of any of the heirs under the entail

Contravening or failing to fulfil, obey, and perform the conditions and provisions above expressed, or any one of them, or acting contrair to the said restrictions and

(1) Lord *Hatherley*.

limitations, or any of them,—that then *such facts, deeds, debts, omissions*, and commissions done, contracted, neglected, or committed contrary hereto, shall be void.

Whilst, on the other hand, the resolutive clause says that

> The persons so contravening or failing to fulfil the before-written conditions or provisions, or any of them, shall lose their right in the estate.

without adding the words which occur in the irritant clause, namely

> Acting contrair to the said restrictions and limitations.

And it has been argued that the "acting contrair to the restrictions and limitations" would have a wider effect than merely contravening the conditions and provisions.

Without forgetting the caution given in some of the authorities which have been cited before your Lordships in this part of the argument against straining the construction of the words in order to effectuate the supposed intention of the creator of the tailzie,—I confess I am unable to discover in this deed any "restrictions or limitations" different from and beyond the conditions and provisions of the deed. And if so, "the contravening of such conditions and limitations" would necessarily be "an acting contrair to them."

It was further objected, that the irritant clause itself was not sufficiently extensive to fence the deed of entail as against written instruments executed in contravention of it; and authorities were cited to shew that "facts and deeds done" might be limited to acts committed, so as not to include instruments executed. It cannot, however, be denied that the words "deeds done" may include, though they do not necessarily include, the execution of a written instrument; and in order to restrict that meaning something should be shewn in the context to indicate the intent of the entailer so to restrict it. But what are the deeds here struck at by the relative word "such?" They must be the deeds referred to by the immediately preceding sentence, namely, "deeds in contravention of the conditions and provisions of the instrument." But amongst those conditions and provisions we find an express prohibition against "disponing, altering, innovating, or changing the tailzie or order of succession thereby prescribed;" also a

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general prohibition "against selling or disponing," and against "any wadset." It is clear, therefore, to me, that the conditions involve a prohibition against written instruments which would affect the entail, and therefore such written instrument would be a "deed" in contravention of the conditions, and would be struck at by the irritant clause. To carry back the relative "such" (as was attempted in the argument) to the words occurring some ten sentences back, so as to restrict the facts and deeds to those there mentioned, would be contrary to the most ordinary rules of grammatical construction, and would, in fact, be forcing the language in order to destroy the instrument.

On these two objections we did not hear the counsel for the Respondents, it appearing to us that they were clearly unfounded.

But two other questions have been put very forcibly in the argument before us which were not discussed in the Court below; namely, first, that there can be no valid tailzie within the Act of 1685 of a share held *pro indiviso* in lands. Secondly, that even if such a tailzie can be created, yet that the tailzie would not affect the entire interest in a portion of the same lands when they have been allocated to an heir in the succession under a decree of division in respect of his *pro indiviso* interest. It was supposed that the Court below would adhere to its decision on a similar question in a recent case of *Stewart* v. *Nicolson* (1), and that it was more respectful to the Court simply to submit to them those points without argument (2). They have now been fully argued before us on both sides.

In order to appreciate the arguments we must first consider the leading facts which occurred between 1749 and 1824, the date of the death of *James Rocheid*.

In 1755 *James Rocheid*, on the death of his father, became the owner of the two fourths of the *Inverleith* and *Darnchester* estates *pro indiviso*, as heir under the entail created by the deed of 1749, assuming its validity. He was also at the same date the owner in fee simple, as was determined, after some litigation, of another one fourth *pro indiviso* of the same estates, derived from Lady *Kinloch*, the sister of *Elizabeth Rocheid*, and Mr. *Cathcart* was the owner of the remaining one fourth. On the 2nd of July, 1773, by

(1) 2nd Series, vol. xxii. p. 72. (2) 3rd Series, vol. vi. p. 307.

a decree of division of the Sheriff of *Edinburgh*, a specific one fourth of the *Inverleith* estate was allocated to Mr. *Cathcart*, and the remaining three fourths were specifically allocated to *James Rocheid*. As to *Darnchester*, *James Rocheid* acquired Mr. *Cathcart's* one fourth and conveyed it to a Mr. *Anderson*, as a trustee for himself, in order, in effect, as it appears, to make a division. And by a decree of division of the Court of Session in February 1785, one fourth was allocated specifically to *Anderson*, and three fourths to *James Rocheid*.

*James Rocheid*, however, being ultimately declared to be entitled in fee simple to the one fourth in both estates which he had derived from Lady *Kinloch*, became desirous of separating the two fourths of the estates derived from *Elizabeth Rocheid* from the one fourth derived from Lady *Kinloch*. And he conveyed the latter one fourth to Mr. *Dundas* as a trustee for himself. He accordingly obtained a decree of the Court of Session, on the 5th of July, 1796, which allocated specific property to *James Rocheid* in respect of the two fourths of *Inverleith* and *Darnchester* purporting to be held under the deed of 1749, and the remainder was specifically allocated to Mr. *Dundas*. It appears that, owing to some subsequent litigation, new decrees of declaration and division were pronounced in March, 1803, and March, 1817.

The property specifically allocated in respect of *Elizabeth Rocheid's* two fourths has ever since the above-mentioned proceedings of division been held distinct and apart from the property allocated in respect of the other shares. But no instruments have been executed for the purpose of giving any further or other effect to the decrees of division; and the titles have been expede as under the deed of 1749, and by the description therein contained of the *pro indiviso* two fourth parts.

*James Rocheid* died in December, 1824, and several successions have taken place by which parties, claiming as heirs designated under the deed of 1749 have held possession of the specifically allocated property—the present Respondent being now in such possession, and the Appellant claiming as trustee under the sequestration against *James Rocheid*.

The first contention, then, under this state of circumstances is, that the original attempt to entail two fourth shares of estates

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*pro indiviso* was futile; and that according to the law of *Scotland* in this matter, as regulated by the Act of 1685, a *pro indiviso* share in an estate is not the proper subject matter for an entail. No authority has been adduced in support of any such proposition. The words "lands and estates" occurring in the statute, of themselves have been held sufficient to include property of a heritable character, such as fisheries and teinds, not being strictly lands. But it is suggested that the words "lands and estates" point to an entire subject and not to a partial interest in a subject. It may be conceded that the word "estate" is not in this particular statute directed to the amount of interest in the subject (such as fee simple, or for life, or the like) but to the subject itself. But I can see no ground for holding that the half of an heritable estate is not itself a definite subject as much as the whole estate, whether held *pro indiviso*, or whether, as at any time it may be, actually divided.

Mr. *Anderson*, in his argument, said that he did not doubt that an entail might be created *inter hæredes* of a share held *pro indiviso*. But if that be so, then we should have expected this statute, finding such entails in existence, or capable of being so, to have struck at their continuance, and to have prohibited them as regards any validity in the view of the statute. On the other hand, in the case of *Stirling* v. *Dun* (1), the very question now brought forward was raised and decided, adversely to the view of the Appellant, by your Lordships' House. It is said that the subject matter there was an appurtenant only to an estate, being an interest *pro indiviso* in a loch adjoining the estate, and that it passed therefore in that respect as an appurtenant. Still the case was argued on the broad ground of an alleged unfitness of such a subject for an entail, not only in the Court of Session, but in your Lordships' House, as appears very plainly by the appeal case.

This decision in *Stirling* v. *Dun* (1) was adopted unanimously in *Stewart* v. *Nicolson* (2) by the four eminent Judges who decided that case. Lord *Curriehill*, on this part of the case, did not express any doubt as to the competency of such an entail. Lord *Deas* said that

> There were few entailed estates in the country which had not at one time or another consisted partly of shares in an undivided commonty, or other *pro indiviso*

(1) Wil. & Sh. 22 June, 1829. (2) 22 Session Cases (2nd Series), p. 72.

property, and it never was supposed that this part of the estate was not validly entailed equally with the rest.

It seems to me that the onus is thrown on the Appellants of shewing, by decision, that property which can be sold, mortgaged, and dealt with in all respects like other property, and which can even (as Mr. *Anderson* admitted in the argument) be entailed as *inter hæredes*, is not "land or estate" capable, under the Act of 1685, of being entailed.

The Lord Advocate, in his very able argument, has greatly relied on the authorities, which have decided, that if an entire estate be entailed the fetters of the entail drop off as soon as the estate falls to heirs portioners. But surely this only shews that when the subject of the entail is divided the entail ends, because its subject is destroyed. This does not afford any ground for inference that where the original subject is a share held *pro indiviso* the entail is bad *ab initio*. The author of the entail deals as he pleases with his property, and points out one entire subject of entail, though that subject may be his *pro indiviso* share in an estate; and it is only when that subject ceases to exist that it must be assumed that his intention, as expressed in the deed, is at an end. In fact, the instance that was put proves that an entail may be good *ab initio*, though liable to destruction by subsequent events, and this was very ably urged by Mr. *Gordon* in his argument for the Respondents, as affording an answer to many of the difficulties which have been suggested in argument as to the rights of the several portioners in regard to undivided property. Take, for instance, the case, which was much pressed upon us, of a house, or other heritable property, incapable of division. If a forced sale should take place at the instance of one of the co-owners, it would necessarily destroy a previous entail of a moiety held *pro indiviso*, by destroying its subject, supposing such an entail to have been created. But I do not see why the entail made originally of a moiety should not be good until the event happens, as in the case of an entail which is good till the estate falls to heirs portioners. As regards the inconveniences which it has been suggested might be occasioned by an entail of an undivided share, with reference to modern Acts of Parliament, I think no inference can justly be raised from that circumstance adverse to the right of entailing the

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shares. For the inconvenience would be the same *inter hæredes*, and might occur in any other portion of the undivided property than in an entail.

Mr. *Anderson*, however, raised a question in the course of his argument, as to the construction of the Act of 1685, as compared with that of 1681, regulating the qualification of electors of Members of Parliament. It has been held, it appears, under the latter Act, that a share *pro indiviso* would not be a good qualification of "land or estate," although its annual value may greatly exceed the value required. But the decisions on this point may well have proceeded partly on the Act itself, which in a case of property adjudged by several creditors, allows only the first in date to vote, and therefore shews an indication in the Act itself that persons who are in the position of co-owners shall not all participate in the privilege. And those decisions may have been founded partly also upon the character and intent of the Act, which might be fraudulently evaded by the multiplication of shares purporting to be held *pro indiviso* without any actual division of the estate. We are not favoured with the reasons upon which those decisions were founded except, I think, in one case where President *Blair* refers to the propriety of strictly following adjudged cases in election law, but does not otherwise announce any special ground as forming the reason for his judgment.

I, therefore, my Lords, come to the conclusion that an estate in tail may properly be created under the Act of 1685, in a share held *pro indiviso* of land.

But another point has been raised as to the effect of the decrees of division. It has been argued that the effect of those several decrees is to destroy the entail. It is said that the subject itself has no longer any existence—that the *pro indiviso* right referred to land situated both in *Edinburgh* and in *Berwick*, two distinct counties, and that the allocated share might, in a very possible case, be in one of those counties alone whilst the other *pro indiviso* owner took the land held in the other county. Again, it is said that the *pro indiviso* owner had no interest whatever at the date of the entail in one moiety of that land the entirety of which he now holds—that the register therefore gave no notice of the real title, especially in this case, where, on the face of the register, the en-

tailed title still appears as of the *pro indiviso* share, whilst *James Rocheid* before and at his death held the entirety of the lands allocated to him.

This is no doubt the gravest portion of the inquiry upon which your Lordships have had to enter in this case. It does not appear to be touched distinctly by decision otherwise than by the case of *Stewart* v. *Nicolson*, and in that case Lord *Curriehill* appears to have doubted whether or not he could, as then advised, concur in the view expressed by the other three Judges. The Appellant contends that new deeds were necessary on the division of the property—and, in fact, the creation of a new entail; involving necessarily, the doctrine that the original feudal title of *James Rocheid* was gone. The question seems really to turn on this last point. We are here *inter apices juris*, and I shall not attempt to avail myself, even by way of illustration, of any maxims of English law. The case must rest upon Scottish authorities alone.

First, then, is any conveyance necessary on a decreet or a division, or is the act of the Sheriff or of the Court simply an act marking out the limits within which each proprietor *pro indiviso* is, for the future, to exercise his original right of ownership over his share of the property. On merely looking to the first principles of reason upon this subject, it would appear that there is nothing necessarily in common between the titles of the co-owners. Each of them respectively may derive a title from a distinct ancestor or from a distinct vendor. And how, then, on the first blush of the case, can it be necessary that a title should be made from one co-owner to the other when succession takes place under a decreet for division? For greater certainty, and by way of evidence under certain circumstances, it may be desirable that some such instrument of disposition should be executed; but the one owner cannot confer any title in reality upon the other; neither can one owner be required to take any part of the land allocated to him affected by a title or burdened with charges which have been created by the other co-owner on his moiety, though it may be that the division itself might be reduced if any of the parties interested in a *pro indiviso* share were not parties to the division.

Then as regards the authorities, the Appellants have cited only two:—Lord *Bankton*, lib. iii. tit. 5, sect. 35, and the Style Book

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In the passage cited from Lord *Bankton*, he refers to the case of division where part of the subject matter is indivisible, namely, a superiority; and he says, "that it will be adjudged to the eldest heir portioner, and the rest must denude of their shares in her favour." And the Style Book suggests "that the Pursuer and Defender in a summons for division and sale should be decerned to execute such deeds and writings as may be necessary to complete the titles of the parties to their respective portions." (1)

It will be at once observed that Lord *Bankton* refers in the passage cited only to the case where an indivisible subject is handed over to one portioner, and of course in that case the shares of the other portioners in the subject matter should be made over by some proper instrument; but the question before us is, whether it is equally necessary to have any such conveyance when the division is actually made, and each portioner takes his aliquot share, and is compelled by the decree itself to withdraw himself into those limits. The Respondents complete the citation from *Bankton* by adding the reference in the very passage cited to another portion of his work, book ii. tit. 4, sect. 6, where he speaks of the necessity of the elder portioner paying for the shares of the others in the indivisible superiority. Of course, therefore, when those shares had to be purchased, it was right and proper that the conveyances of the shares which were so purchased should be made to the party purchasing them, and therefore taking the conveyance of their shares. In no other author, from Sir *James Balfour* downwards, does there appear to be any direction for the conveyance under a decree for division in the case of a brieve of division by the Sheriff. In the other mode of procedure to which the Style Book refers, which is the more recent mode, by an action for division, it seems that directions are contained, not always, but frequently, for the execution of proper deeds and writings for carrying the proceedings into effect; but this may well be *ex majore cautelâ*, and certainly there appears no instance, at least none has been produced before us, of any such deeds being either compellable in a division made by the Sheriff, or even under a decree. Lord *Ivory*, in *Stewart* v. *Nicolson*, cites an opinion of an eminent Scottish feudalist, to the effect that such a conveyance

(1) 3 Jur. Styles, p. 146.

would be improper in a case where, singularly enough (as here), part of the estate was held *pro indiviso* in tail, and the other part *pro indiviso* in fee simple. I confess I can see no reason for doubting the soundness of the reasoning of Lord *Deas* in *Stewart* v. *Nicolson,* which leads him to his conclusion, "that after the division the lands are not different, but that anterior to division the lands of each had not been ascertained." In fact, where the property is in its nature capable of division, as, say, a single field, the Sheriff simply makes a fence or fences across the field, and delivers to each owner his own share by his own title; and it requires no concurrence on the part of the other owner, by way of deed or instrument, to effectuate the transaction.

It struck me at one time that there might be something more in the argument that the register did not after division give notice of the title on which the whole is held; but I think that all parties concerned, having notice of the entail of the moiety held *pro indiviso,* must be taken to know that such moiety was subject to the law which renders the whole property divisible by the Sheriff or the Court, at the instance of any person who might so require the division to be made; and, therefore, having notice of the whole extent of the property the share in which is entailed, they must be taken to know that in any part of that property an entire separate interest may be, or may have been, at any time allocated out of the whole to the heir in tail.

For these reasons I venture to submit to your Lordships, though of course with diffidence upon a subject of this character—at the same time, however, feeling greatly confirmed by the concurrence of all the four Judges in the case of *Stewart* v. *Nicolson* upon the first point, and of three of those Judges upon the second point—that the interlocutors complained of be affirmed, and the appeal dismissed with costs.

LORD COLONSAY:—

My Lords, I begin with the question, whether an estate held *pro indiviso* can be made the subject of an entail under the Act of 1685. It was argued that the words of that statute, "their lands and estates," must necessarily mean separate or separated lands and estates, as contradistinguished from lands and estates held

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*pro indiviso*. But there is nothing, I think, in the words themselves to indicate this—they are quite general. One who holds large landed estate *pro indiviso* is an owner of "lands and estate" in the ordinary signification of the words of the statute.

Holding that an estate thus possessed *pro indiviso* is within the ordinary meaning of the words of the Act of 1685, upon what authority is it described as incapable of being entailed? I know of no author who says so. I know of no case which has so decided. It may be sold or mortgaged, and it is subject to the same rules of succession as any other landed estate.

An argument was deduced by the ingenuity and research of my learned friend Mr. *Anderson* from the Statute of 1681, which he designated as contemporaneous legislation. His argument was, that the language of that statute must be read as explanatory of the language of the Statute of 1685. Now, in the first place, I do not find in those two statutes any identity or even similarity of expression beyond this—that the word "lands" occurs in each of them. In the second place, they have no similarity of purpose. They deal with matters altogether different; they are not in reference to the same objects or subjects. The Act of 1681 has reference entirely to rights of political franchise, derivable indeed from land, but only from land held in a particular manner, and described in the statute as being qualified by a certain valuation. It has been ruled in election law that an individual claiming under that statute to exercise the franchise must shew not only that he individually is the owner of lands, but that such lands are separately valued in the cess-books at the requisite amount, and that can only be arrived at by having those lands separated from all others in the valuation-roll. From expressions and provisions in the Act of 1681, it is obvious that such separation or division was contemplated with a view to the franchise, and accordingly the course of decisions on election law has been in that direction. But there is no authority or ground for saying that, in reference to the law of entail, or the Act of 1685, there has been any ruling in that direction, or that the same reasons are applicable.

An estate held *pro indiviso* may be destined to descend like any other estate. But it is said that it is liable to the contingency of being divided, and that therefore it cannot be the subject of

an entail under the Act of 1685. The contingency of subsequent division is not an objection to an entail, as is shewn by the case of heirs portioners. In the case of an entail of an estate not held *pro indiviso*, that estate, if the entail does not exclude heirs portioners, is liable to division when the succession comes to heirs portioners; and it has been held under the entail law, for reasons which I shall afterwards notice, that when heirs portioners succeed the entail comes to an end. But the possibility of that occurrence is not regarded as a reason why the entail should not be good until that occurrence arrives. And therefore I see no ground for holding that because this class of estate may at some future period come to be divided, it should not, in the first instance at least, be capable of being made the subject of entail. I have not the slightest doubt that there are several entails of estates of this character—there are certainly many in which parts of the estate are of this character—and we see from the case quoted by Lord *Ivory* (1), giving us the opinion of one of the most eminent of our real property lawyers (2), that such a thing occurs, occasionally at least, and that it was not considered in former times as at all out of the rule of the Act of 1685. I therefore think that an estate, though held *pro indiviso*, may be made the subject of entail. It may be made the subject of sale; it may be made the subject of mortgage; and it descends like any other feudal estate. I see nothing in its character different from that of the most ordinary feudal right, except that it may at any time be made the subject of division.

It is asked, if this doctrine be sound, what is to be said in reference to an entail of a *pro indiviso* half of a house, where the entail might be put an end to by a process of sale? That rather belongs to the other branch of the argument; but I will just observe, in passing, that although it could be shewn that as to a certain class of subjects which do not admit of division an effectual entail of a *pro indiviso* share could not be made, it would not follow that all property held *pro indiviso* is to be put beyond the pale of the statute.

But there arises a question of great importance, namely, whether

(1) See *Stewart* v. *Nicolson*, 2nd Dec. 1859; 2nd Series, vol. xxii. p. 72.
(2) The late Mr. *Thomas Thomson*.

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the property when separated by division from the properties of the other *pro indiviso* proprietors remains under entail. Now, that point, I think, is one which runs a little into subtlety, but it is one which must be dealt with. Does the division of the property alter the estate? Or does it merely alter the mode of possessing the estate? When the division takes place it is not necessary (I hold that to be clear) that there shall be dispositions by the several parties to each other. The matter of division of a property of this kind is treated of by all our authorities, from Sir *James Balfour* downwards, and not one of them suggests that such dispositions are necessary. And the styles, till a recent date, did not contain any clause for executing dispositions. The clause which has been lately introduced into the styles does not necessarily imply that the conveyances provided for are to be from the one party to the other of property which admits of division. Such a clause may be useful if there is property concerned which does not admit of division; or it may be useful if one of the parties has to make a conveyance or a deed, in order to complete his own right; but still there is no trace in our authorities, from the earliest to the latest, that a conveyance from one *pro indiviso* proprietor to another is necessary to complete the right. On the contrary, the feudal right remains on the original infeftment just as it did before the division.

Then, if that be so, why should not the entail right remain? It is said that parties going to the register of entails will not know that what they see there as the entail of a *pro indiviso* estate is the entail of what is now possessed as a separate estate. But if the estate is feudally the same, if no alteration is necessary upon the register which shews the right to the property, the register which parties look at to see who is owner of the property, if that register does not require to be altered, why should it be necessary to alter the register of entails, where you go only to see whether the entail of the right has been recorded. A decree of division has always been held to be a complete arrangement of the right, requiring no new feudal investiture to be made at the time. And therefore I cannot see why it should necessitate the making and recording of a new entail, or the entry in the register of entails of something which is neither an old entail nor a new entail.

If the subject be of a kind which does not admit of actual partition, such as a superiority, which Lord *Bankton* (1) has alluded to, it may be necessary, when a division of interests takes place among co-heiresses, that conveyances should be made from one to the other.

It is true that when a division among heirs portioners takes place the entail previously existing is held to be destroyed. Why? Is that a parallel case? The division we are now dealing with is not a division of the entailed estate, it is not a division within the entail. The estate now to be possessed, and which must be held to have been from the beginning the property of the party, though the mode of possession is now to be varied, remains complete. The party has as much as he had before. The whole object of the entailer is accomplished by handing down the estate, neither greater nor less than it was. But when an estate descends to heirs portioners, then each is to take his or her own share of that estate. If the entailer had intended that the estate should descend to one of them he would have excluded heirs portioners. But not having done so, the estate is divided, and so there comes to be a partition within the entail which destroys the unity of the estate; and if these heirs portioners were to be again succeeded by heirs portioners, the estate would be frittered down to mere shreds. That is not the object of an entail; the presumed object of an entail is to keep the estate entire, and, therefore, when there comes to be a partition of the entailed estate in the course of succession, the presumed object of the entail has come to an end, whereas the kind of division or separation we are now dealing with not only preserves the whole entailed estate, but gives to it greater unity.

For these reasons, without adding more to what has been said by my noble and learned friend upon these points, I think that neither of them can be effectually maintained. I think it is impossible to read the full judgments given by Lord *Ivory* and Lord *Deas*, in the case that has been referred to (2), without seeing that the conclusion arrived at is the one which ought to be sustained. I have the greatest possible respect for the opinion of my late learned

(1) Book iii. tit. 5, s. 75.

(2) *Stewart* v. *Nicolson*, 2nd Dec. 1859, 2nd Series, vol. xxii. p. 72.

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friend Lord *Curriehill* (1), who was a great authority; but upon that particular point upon which he expressed doubt I think he was hesitating about minor matters, not taking a sufficiently broad view, but rather going upon particular critical views, such as I cannot give my assent to.

Supposing all I have said to be right, supposing that an estate held *pro indiviso* was a proper subject for entail, and supposing that the partition of the estate did not operate as a destruction of the entail,—still there remains the question whether this particular deed of entail, as applied to any estate, would be a good entail, or whether it is not defective in one or other of the cardinal clauses. Now the objections that have been stated to these clauses are, I think, hypercritical. Objections are stated to the prohibitory clause of the entail. That clause is as follows:—

It shall not be lawful to, nor in the power of, *Alexander Kinloch*, or his heirs, to alter, innovate, or change this present tailzie and settlement, or yet the order of succession hereby prescribed, nor to do any other deed that may import or infer any alteration, innovation, or change of the same, directly nor indirectly, *nor to sell, annalzie, or dispone*, either irredeemably or under reversion, nor yet to wadset or burden with infeftments of annual rent, or any other servitude, or burden *my lands and estate above written, or any part thereof.*

Now the first objection to this clause is, that it does not prohibit sale. That objection is founded upon these words "nor to sell, annalzie, or dispone, either irredeemably or under reversion," and stopping there, the prohibition is said to be imperfect. To sell and dispone what? The obvious answer is found in the words "my lands and estate above written or any part thereof."

Another objection is, that the clause does not sufficiently prohibit the contraction of debt. I cannot see that there is any force in that. It says, "nor yet to contract debts upon the said estate"—But it is said that this applies only to contracting debts in a particular manner. That is a point which has been so often decided that it is quite in vain to struggle against it now.

Then an objection is taken to the irritant clause. That clause provides that if any person—

shall *contravene or fail to fulfil and obey* and perform the several conditions and provisions above expressed, or any one of them, or shall *act contrary to the said*

(1) See Lord *Curriehill's* opinion in *Stewart* v. *Nicolson*, already referred to.

*restrictions and limitations, or any of them*, that then, and in these or any of these cases, not only such *facts, deeds, debts*, omissions and commissions *done, contracted*, neglected, or committed contrary hereto, with all that may follow thereupon, shall be in themselves void, null,

and so on. It is said that this is not a good irritant clause, because it does not say expressly that if they "contract debts" or "commit deeds" contrary to the conditions and provisions above expressed, or any one of them, such debts and deeds shall be void. Now assuming the prohibitory clause to be complete, then this irritant clause contains a declaration that if they shall contravene or fail to fulfil the provisions above expressed, or any one of them, or shall act contrary to them, then in any of those cases what is to happen? Such facts, deeds, debts, omissions, and commissions, and so forth, shall be void and null; but facts, deeds, and debts are words which, I think, in their collocation here, and in the position in which they stand in the context, admit of no doubt at all. Facts and deeds are themselves words of very large application, and must be applied with reference to the subject matter of the clause, and when we see that this clause relates to any contravention, any failure to obey, or any acting contrary to the restrictions and limitations before mentioned, or any of them, I think there can be no doubt that the words are sufficient to strike at all contraventions of the prohibitions.

But then the resolutive clause must be looked at, as it is also said to be imperfect inasmuch as it says that any person so contravening or failing to fulfil the "conditions and provisions" shall lose the estate, but does not say that any person contravening the "restrictions and limitations" shall lose the estate. It is attempted to be shewn that according to the particular use of words in this deed, "restrictions and limitations" mean one thing, and "conditions and provisions" mean another. Now I cannot go with that distinction. I think that "conditions and provisions" cover every thing. In the first place, they are the words of the Act of 1685. And in the next place, I see that every one of the prohibitions is under a special provision. Every one of them is introduced as a provision, and this clause says that any person failing to fulfil the before-written conditions and provisions, or any of them, shall lose his right and interest in the estate. I therefore think that there is

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no ground for maintaining these critical objections. I think that they cannot possibly receive effect, and upon the whole I fully concur in the conclusion of my noble and learned friend on the woolsack that the appeal must be dismissed with costs.

*Interlocutors affirmed, and appeal dismissed with costs.*

Solicitors for the Appellant: *Holmes, Anton, Greig, & White.*
Solicitors for the Respondents: *Connell & Hope.*

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*April* 11.

THE REVEREND G. H. FORBES, OF THE SCOTCH EPISCOPAL CHURCH . . . . . } APPELLANT;

THE RIGHT REVEREND BISHOP EDEN, PRIMUS OF THE SCOTCH EPISCOPAL CHURCH, AND SEVEN OTHER BISHOPS, TOGETHER WITH FOURTEEN SUBORDINATE ECCLESIASTICS, ALL AS MEMBERS OF A GENERAL SYNOD OF THE SCOTCH EPISCOPAL CHURCH, HOLDEN AT EDINBURGH IN 1863; AND ALSO AS INDIVIDUALS (1) . . . . . } RESPONDENTS.

*Voluntary Associations—Their Independence.*

6 PC 189

*Per* LORD CRANWORTH:—Save for the due disposal and administration of property there is no authority in the Courts either of *England* or of *Scotland* to take cognizance of the rules of a voluntary society entered into merely for the regulation of its own affairs. But if funds are settled to be disposed of amongst members of a voluntary association, according to their rules and regulations, the Court must necessarily take cognizance of these rules and regulations, for the purpose of satisfying itself as to who is entitled to the funds.

*Per* LORD COLONSAY:—A Court of Law will not interfere with the rules of a voluntary association, unless to protect some civil right or interest which is said to be infringed by their operation.

*Church Canons—Negation of Civil Jurisdiction.*

Suit instituted in a Civil Court by a clergyman of the Scotch Episcopal Church, to set aside certain canons passed in 1863, for the purpose of

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(1) This case, formerly given in the *Weekly Notes* of the 20th of April, 1867, is now reported more fully at the request of a high authority,—having regard to recent events, and possible questions.

cementing the union between the Scotch Episcopal Church and the Church of *England* and *Ireland*.

Suit dismissed with costs.

*Ecclesiastical Synod—Its Character and Authority.*

*Per* THE LORD CHANCELLOR:—A General Synod of the Church duly and regularly summoned, has the undoubted power to alter, amend, and abrogate the canons in force, and to make new ones.

*Per* LORD CRANWORTH:—The Synod is the supreme body where there is not (as there is in the Church of *England*) a temporal head.

THE Episcopal Church of *Scotland*, though only tolerated by the State, and deriving no support from the civil government, yet, nevertheless, claims authority to ordain, change, or abolish ceremonies and rites of merely human authority, as distinguished from doctrines and principles which, founded on the Scriptures, are fixed and immutable.

In 1811 a General Ecclesiastical Synod of the Protestant Bishops of *Scotland*, with the deans of their several dioceses and the representatives of their other clergy, passed certain canons for the preservation of ecclesiastical order and discipline. A second General Synod was held in 1828, when the Canons of 1811 were revised and altered; and a third was held in 1829, when some of the enactments of 1828 were repealed.

But, in consequence of a general desire expressed that the entire code of the Episcopal Church of *Scotland* should be wholly revised, another General Ecclesiastical Synod was summoned, and assembled in *Edinburgh* on the 29th of August, 1838; and, being duly constituted, did then and there adopt and sanction an amended general Code of Canons for the future government and discipline of the said Church—the resolution to this effect, with its several provisions and enactments, being signed by seven bishops, three deans, and six delegates.

The recital of that resolution expressly stated that the Episcopal Church of *Scotland* was "in full communion with the United Church of *England* and *Ireland*; the Scotch Church adopting as the standard of her faith the Thirty-nine Articles; and claiming, under the 34th of them authority to ordain, change, or abolish ceremonies and rites established only by man's authority, so "that all things should be done to edifying."

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Such being the state of things, it happened that in the year 1848, Mr. *Forbes*, the above Appellant, was ordained a clergyman (1) of the Scotch Episcopal Church; and in 1850 was instituted to the pastoral charge of *Burntisland* in *Fifeshire;* where, out of his own private means, he built a house, a school, and part of a chapel—receiving from his congregation £40 per annum for stipend.

Prior to his ordination he was called upon to subscribe, and did subscribe, as follows:—

(1.) The book of Articles of Religion agreed upon by the archbishops and bishops of both provinces of the realm of *England* and the whole clergy thereof, in the convocation holden at *London* in the year of our Lord 1562; and (2.) The Canons of the Episcopal Church in *Scotland*, drawn up and enacted by the bishops and clergy of that Church, in a Synod holden for that purpose at *Edinburgh* in the year of our Lord 1838.

From the date of his institution Mr. *Forbes* laboured zealously in the discharge of his duties. But an event occurred which rendered him uneasy and dissatisfied.

In the year 1863 a new body of canons was issued by the General Ecclesiastical Synod, holden at *Edinburgh*.

In order to cement more closely the union between the Church of *England* and *Ireland* and the Episcopal Church of *Scotland*, while recognising the use of the Scotch Office, wherever it had previously been followed, and in all new congregations of whom the majority should be disposed to adopt it—the General Synod of 1863 established the Book of Common Prayer of the Church of *England* and *Ireland* as the Book of Common Prayer of the Episcopal Church of *Scotland*.

The Appellant conceived that this new Code of 1863 involved the breach of an indissoluble contract with him, inasmuch as he had accepted his ordination and institution under the Code of 1838, from which the Code of 1863 involved, in his judgment, unwarrantable deviations.

Acting under this conviction, Mr. *Forbes*, on the 21st of March, 1864, instituted the present suit, calling upon the Court of Session to rescind, reduce, and set aside the following portions of the Code of 1863, namely—Article 20, sect. 4; Article 28, sect. 20; Article

(1) A presbyter

29 ; Article 30, sects. 2-4, and Article 38, sect. 3 (1) ; and, "in any event," he sought a judicial declaration that it was *ultrà vires* of the Respondents, or of any General Synod of the said Church, to alter, amend, or abrogate any of the Canons of 1838, except in so far as might be in conformity with the constitution and practice of the said Church at the period of the Appellant's ordination.

The Appellant further asked by his summons to have it found and declared as follows: namely,

That he was entitled to celebrate Divine worship, and all the other services, and to administer the sacraments and all other rites of the said Church, in conformity with the said canons enacted in the year 1838 ; and that he was entitled to the free exercise and enjoyment of all the privileges conferred on him under the said canons, or under the deed of institution in his favour. And that the said Respondents should be ordained to make payment to the Appellant of the sum of £120, being the amount paid by him, or for which he was liable in payment, to the Rev. *John Wilkinson*, for his services as curate to the said Pursuer, in terms of an agreement between them to that effect, of which services the Pursuer was deprived through the wrongous refusal of a license to the said Rev. *John Wilkinson*, and also of the sum of £200, in name of compensation, damages, and *solatium*, for the loss and injury which he has sustained patrimonially, and in his health and feelings, by and through such wrongous refusal of licence.

The Respondents, in their defence, relied upon the principle that Courts of civil jurisdiction will not take cognizance of questions as to religious doctrine or discipline, except for the purpose of enforcing civil rights or redressing civil wrongs.

The Lord Ordinary (2) held that the grounds stated were not sufficient to support the suit, and he therefore gave judgment

(1) The Appellant alleged that the Code of 1863 had displaced the Scotch Communion Office, so that the relative positions of the Scotch and English Offices were reversed—inasmuch as that formerly the Scotch Office was the authorized one and the English only permitted—whereas now, the English Office was the authorized one and the Scotch only permitted. In one passage of his printed case the Appellant said: "It is needless to point out what a real difference there must be between a Church which has neither altar nor sacrifice, and one which has both, as the Scotch Episcopal Church had up to the passing of the Canons of 1863." The Appellant objected to the power given to bishops to open missions. He objected to the power given to General Synods to enact new canons and abolish existing ones. He objected to the use of the Book of Common Prayer. And he objected to the directions of 1863 as to the Visitation of the Sick and the Burial of the Dead.

(2) Lord *Barcaple*.

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against Mr. *Forbes*, with costs; making, in explanation, the following remarks:—

The Lord Ordinary does not know of any similar demand having hitherto been made for the intervention of a Court of law in matters touching the faith and discipline of a religious denomination. There is not here any violation of statutory duties and rights as in the *Auchterarder Case* (1). Neither is there the alleged perversion of property from its destined use, as in *Craigdallie* v. *Aikman* (2); *Smith* v. *Galbraith* (3); and *Attorney-General* v. *Pearson* (4); and the case of *Lady Henley's Charity* (5). Nor is there the allegation of direct patrimonial injury done by an ecclesiastical body acting illegally, as in the case of *M'Millan* v. *The Free Church* (6), or of injury by libellous matter contained in an ecclesiastical sentence, as in *Dunbar* v. *Skinner* (7). In all these cases it was not only alleged that the ecclesiastical body or its office-bearers had violated the law or constitution of the Church, but a direct and substantive injury was alleged to have been inflicted on the party seeking redress (8).

Against this adjudication Mr. *Forbes* having reclaimed, the Second Division of the Court of Session, on the 8th of December, 1865, adhered to and confirmed the interlocutor complained of with further costs.

Mr. *Forbes*, conceiving that both these judgments were contrary to Law and Equity, appealed for justice to the House of Lords—having for Counsel Sir *Roundell Palmer*, Q.C., and Mr. *Fitzjames Stephen*, Q.C. When, however, the case was called, Mr. *Forbes* desired to offer his argument in person. He accordingly addressed the House, and stated, with great ability, his case to the House.

The *Attorney-General* (9), and Mr. *Mundell*, Q.C., were heard for the Respondents.

The following opinions were delivered by the Law Peers.

THE LORD CHANCELLOR (10):—

My Lords, this is an appeal from certain interlocutors pronounced in an action brought by the Pursuer, the Reverend *George Hay Forbes*, described as the minister of the Scotch Episcopal Congregation, *Burntisland*, against the bishops and several of the clergy

(1) McL. & R. 220; 6 Cl. & Finn. 646.
(2) 1 Dow. 1; and 2 Bli. 529.
(3) Fac. Coll. June 6, 1839.
(4) 7 Sim. 290.
(5) 7 *Ibid.* 309.
(6) 23 Dun. 1314.
(7) 11 Dun. 945.
(8) 2nd Series of the Scotch Cases, vol. iv. p. 143.
(9) Sir *John Rolt*.
(10) Lord *Chelmsford*.

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of the Scotch Episcopal Church, all as members of a General Synod of the said Church, holden at *Edinburgh* on the 8th of July, 1862, and continued by successive adjournments and prorogations until the 13th day of February, 1863, and as individuals.

The object of the action is to have it declared that certain canons enacted by the General Synod ought to be reduced, or, in any event, to have it declared that it was *ultrà vires* of the Defenders, or of any General Synods of the Church, to alter, amend, or abrogate any of the canons contained in the Code which was enacted by an Ecclesiastical Synod holden at *Edinburgh* in the year 1838, or to make new canons for the Church, except in so far as they may be in conformity with the constitution recognised, and the practice acknowledged, in the said Church at the time of the Pursuer's ordination as a minister thereof, and set forth in the Code of Canons of 1838, which was then subscribed by him. And that it ought to be found and declared that the Pursuer is entitled to celebrate Divine worship and all the other services, and to administer the sacraments and all other rites of the Church, in conformity with the canons enacted in 1838. And the Pursuer also claimed that the Defenders should be decerned and ordained conjunctly and severally, or severally and respectively, to make payment to the Pursuer of the sum of £120, for which he is liable to the Rev. *John Wilkinson* for his services as curate, of which services he was deprived through the wrongous refusal of a license to Mr. *Wilkinson*, and also of the sum of £200 for the loss and injury which the Pursuer has sustained patrimonially, and in his health and feelings, by and through the wrongous refusal of the license.

Mr. *Forbes* was ordained a minister of the Episcopal Church of *Scotland* in the year 1848. Prior to his ordination, in accordance with the law of that Church, he subscribed the Thirty-nine Articles and also the Canons of the Episcopal Church in *Scotland*, enacted, in the year 1838. He was instituted to the charge of the Episcopal Congregation of *Burntisland*, as the pastor or minister of the congregation, with a license to him "to read in his present place of assembly for public worship, or any chapel in the diocese, the public prayers of the Church; to administer God's Holy Sacraments, to preach His Holy Word, and to perform, according to the

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rites and ceremonies of the Episcopal Church in *Scotland*, every other sacred office which it is competent for a presbyter to perform."

This institution of the Appellant differs from the form of "institution to a pastoral charge," given in the Appendix to the Code of Canons of 1838, which, after reciting a presentation offered to the bishop by the Episcopal Congregation, assembling for public worship at a particular chapel, in favour of the person to be instituted, runs: "We, the bishops, do hereby institute and appoint the said Reverend [ ] to be pastor or minister of the said congregation."

The Appellant, after his institution, erected, at a cost of between £3000 and £4000, a clergyman's house, a school, and part of a chapel. He alleges in his condescendence, that as minister at *Burntisland* he is in receipt of an income which amounts to about £40 a year, and that he receives from the *Scotch Episcopal Church Society* an annual grant of £10 towards the expenses of a school which he maintains. And also that he is a member of the *Scotch Episcopal Friendly Society*, which is confined to the clergy of the Scotch Episcopal Church, and which gives to the widows of the subscribers annuities of £30, and to their children the sum of £300.

The ground of action laid by the Appellant is, that the General Synod, in making alterations in the Code of Canons of 1838, by the New Canons of 1863, have departed from the recognised constitution and acknowledged practice of the Scotch Episcopal Church, and have therefore violated the contract into which he entered by subscribing the Code of 1838. And he alleges that he cannot conscientiously obey this New Code, and in consequence may become liable to penalties, even to the degradation from his office of minister of the Scotch Episcopal Church, and thereby be deprived of all the temporal advantages he derives from his office of minister of the congregation of *Burntisland*, which is a damage and injury of which the Civil Courts can take cognisance. The Appellant does not allege any actual damage which he has sustained, except with regard to the refusal to license his curate; but he founds his action upon the possibility of his sustaining damage hereafter by a conscientious adherence to his own views of his obligations, and upon what I must call a sentimental feeling of having been brought to be a member of an association which,

departing from the original terms of communion, has left him in the position of a dissenter.

If it had not been for the petitory conclusion of the summons, I think there might have been a plea to the relevancy of the action upon the claim for reduction of the enactments in the Code of Canons of 1863. Supposing the Appellant to have really sustained damage by reason of the Code of 1863, it would have been open to the Court to consider whether the General Synod had authority to make the canons from which this civil injury had arisen. But actual damage flowing directly from the effect of the Canons of 1863 is wholly out of the question. The Court had, therefore, to consider whether it could properly entertain the question of the reduction of the canons upon the ground that they were a departure from the doctrine and discipline of the Scotch Episcopal Church at the time the Appellant became one of its ministers. Now, this it refused to do, as it was a mere abstract question involving religious dogmas, and resulting in no civil consequences which could justify the interposition of a Civil Court.

The case of *McMillan* v. *The General Assembly of the Free Church of Scotland* (1) was frequently relied upon in the course of the argument, and the opinions of the Judges were referred to on both sides. The Appellant urged it as a strong authority in his favour, because it was there held that sentences of suspension and deposition pronounced by the General Assembly of the Free Church of *Scotland*, a voluntary religious association, against one of its ministers, were properly the subject of an action of reduction and damages on the allegation that such sentences had been irregularly pronounced in excess of their powers, and in violation of the conditions which regulated the proceedings of the association amongst themselves, and which were alleged to form a contract amongst the members of the association. But it must be observed that in that case there were actual sentences of suspension and deposition, from which the loss of the Pursuer's emoluments as minister of the Free Church of *Cardross* followed as a consequence. The Appellant in this case has not been disturbed either in his charge of the congregation at *Burntisland*, or in his legal position as a minister of the Scotch Episcopal Church. If he had been,

(1) 23 Dunlop, 1314.

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though in this latter respect only, I should have considered, with the Lord Justice Clerk, that "the possession of a particular status, meaning by that term the capacity to perform certain functions, or to hold certain offices, is a thing which the Law will recognise as a patrimonial interest, and that no one can be deprived of its possession by the unauthorized or illegal act of another without having a legal remedy."

The Appellant not having sustained any injury which can be the subject of cognizance in a Civil Court, his appeal might be shortly disposed of upon that ground. But the questions of the power of the General Synod to enact the Code of Canons of 1863, and their moral effect upon the position of the Appellant as a minister of the Scotch Episcopal Church, have been so earnestly and strongly pressed upon your Lordships' attention that I do not feel justified in passing them by without notice.

The Appellant rests his claim to maintain his action upon the following grounds. He alleges that by his ordination as a minister of the Scotch Episcopal Church he became a member of a voluntary religious association under a contract, the terms of which were contained in the Canons of 1838, which he subscribed. That it was not competent to any number of the members of the association, short of the whole body, to change its fundamental character, and that the enactment of the Canons of 1863 was a violation of the contract into which the Appellant had entered, and materially and injuriously affected his position as a member of the association.

It does not appear to me that the Canons of 1838 can properly be regarded as the contract between the members of the Scotch Episcopal Church at the time when the Appellant was ordained to the ministry. They are principally, if not altogether, directed to the regulation of order and discipline, and contain nothing with regard to the fundamental doctrines or articles of faith upon which the constitution of a religious community depends. But assuming that the Canons of 1838 are to be taken as the contract between the members of the Scotch Episcopal Church, the Appellant subscribed (amongst the rest) to the 33rd Canon, which declares that "a General Synod of the Church, duly and regularly summoned, has the undoubted power to alter, amend, and abrogate the canons in force, and to make new canons." And by his subscription to the

Thirty-nine Articles he agreed that the Church has authority over rites and ceremonies, as declared in the 20th and 34th Articles.

But the Appellant says that the 33rd of the Canons of 1838 only permits such alterations, amendments, abrogations, and new canons as are in conformity with the recognised constitution and acknowledged practice of the Church, and that the 30th of the Canons of 1863 is at variance with such acknowledged practice, as, upon certain occasions, it displaces the Scotch Communion Office, and substitutes for it the Communion Office of the Book of Common Prayer.

In support of this objection the Appellant relies upon the 21st Canon of the Code of 1838. That canon, after referring to the 20th and 34th of the Thirty-nine Articles, and reciting that the Episcopal Church in *Scotland* had long adopted, and very generally used, a form for the celebration of the Holy Communion known by the name of the Scotch Communion Office, which form had been justly considered as the authorized service of the Episcopal Church in the administration of that sacrament, and that in order to promote an union among all those who profess to be of the Episcopal persuasion in *Scotland*, permission was formerly granted by the bishops to retain the use of the English office in all congregations where the said office had been previously in use, which permission is now ratified and confirmed, enacts "that in the use of either the Scotch or English office no amalgamation, alteration, or interpolation whatever shall take place, nor shall any substitution of the one for the other be admitted unless it be approved by the bishop." From respect, however, for the authority which originally sanctioned the Scotch Liturgy, and for other sufficient reasons, it enacts "that the Scotch Communion Office continue to be held of primary authority in this Church, and that it shall be used not only in all consecrations of bishops, but also at the the opening of all General Synods."

Now, by the 30th of the Canons of 1863, it is enacted that "at all consecrations, ordinations, and synods, the Communion Office of the Book of Common Prayer shall be used." This, the Appellant contends to be clearly contrary to the acknowledged practice of the Church, and that the primary authority of the Scotch Communion office is not preserved by the enactment in this 30th Canon, "that the adoption of the Book of Common Prayer as the service

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book of the Church shall not affect the practice of the congregations of this Church which now use the said Scotch Communion Office;" the practice of the congregations of the Church being something different from the acknowledged practice of the Church. And the Appellant complains that as he is obliged to attend ordinations, he may be compelled to receive the Communion according to the Office of the Book of Common Prayer, to which he has a conscientious objection.

It seems difficult to say that there can be any acknowledged practice with respect to the use of the Scotch Communion Office, when the 21st Canon of 1838, upon which the Appellant relies, notices the previous permission to use the English Office, and ratifies and confirms that permission, and also sanctions the substitution of the one office for the other. The acknowledged practice, therefore, was not the uniform use of the Scotch Office in the Episcopal Church, but of the English and Scotch Offices in different congregations.

The Appellant lays great stress upon the enactment in the 21st Canon that the Scotch Communion Office shall continue to be held of "primary authority" in the Church. I understand these words as merely giving to this office the highest claim to respect and deference, in consequence of the authority from which it proceeded. But if more than this was meant, then the same power of a General Synod which gave the paramount place to this Communion Office might make a new canon respecting it, unless such canon was at variance with acknowledged practice. Now it has been shewn that there is no uniform, and, consequently, no acknowledged practice in the Church with respect to the Communion Office. The different forms are used in different congregations and all the congregations together make up the Church.

I now turn to the complaint of the Appellant, the General Synod having, by Canon 29 of the Code of 1863, enacted "that the Book of Common Prayer as now authorized, according to the sealed book, is, and shall be held to be, the service book of the Church for all the purposes to which it is applicable, and that no clergyman shall be at liberty to depart from it in public prayer and administration of the sacraments, or in the performance of other Divine offices, except so far as the circumstances of this Church require,

and as specified in the Canons of this Church." The Appellant contends that this canon is an essential change in the Canons of 1838, and not within the competency of the General Synod. And he complains that it lays a burthen upon his conscience by imposing upon him the necessity of using certain offices of the Church to parts of which he has a conscientious objection, as for instances, the Office of Baptism, of the Visitation of the Sick, and of the Burial of the Dead.

The ground of this objection is, that the Canons of 1838 nowhere require that the Book of Common Prayer should be used upon every occasion in the performance of the Divine offices; the 28th Canon merely enacting "that in the performance of Morning and Evening Service the words and rubrical directions of the English Liturgy shall be strictly adhered to." But although in the Canons of 1838 it is nowhere said in so many words that the Book of Common Prayer shall be used on all occasions, yet with respect to the services to which the Appellant refers, in each instance provision is made that the Book of Common Prayer shall be used, and in each the two Codes of Canons substantially agree.

Take, in the first place, the Sacrament of Baptism, under the 17th Canon of 1838. It certainly is not expressly said that the form in the Book of Common Prayer shall be used, but it is more than implied when it is said, "As uniformity in the administration of the Sacrament is as desirable as in the other services of the Church, the privacy of the administration shall be no reason for any departure from the form prescribed for public use, to which the minister shall always adhere, except in cases of extreme danger, where the form of private baptism shall be used as directed by the Rubric," which can mean no other Rubric than that in the Book of Common Prayer. Again, the same canon refers expressly to this book in providing for the case of baptism where there is a doubt as to the validity of a former baptism, for it requires the clergyman "to baptize the person in the form of words prescribed in the Book of Common Prayer in cases of doubt."

I am unable to appreciate the objection made to the Canon of 1863, with respect to the parents of the child being sponsors in default of other godfathers and godmothers. The Canon 17 of 1838 speaks of parents either becoming sponsors themselves, or of

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procuring godfathers and godmothers. The difference is slight, and scarcely perceptible, and, at all events, can hardly be considered a substantial objection to the canon.

I now turn to the Office for the Visitation of the Sick, in which I am at a loss to discover any difference between the Old and the New Canons. In Canon 23 of 1838 the clergyman called upon to visit any sick member of his congregation is required to repair to the sick person's house, and there be ready to administer all suitable comfort and instruction, either according to the Order for the Visitation of the Sick as appointed in the Book of Common Prayer, or in any other way as he shall think most needful and convenient. Is the Appellant, by the Canons of 1863, compelled to use an office to which he conscientiously objects? On the contrary, the 38th Canon of the Code of 1863 permits him, in the very words of the Canon of 1838, to administer comfort and instruction, "either according to the Order for the Visitation of the Sick, or in such other way as he shall think most needful and convenient."

The Appellant complains of the obligation always to use the Book of Common Prayer in the performance of Divine Offices, as making it compulsory upon him to read the Burial Service over the Dead, as if it were a duty imposed upon him for the first time by the Canons of 1863. Whereas in Canon 23 of the Canons of 1838, it is enacted that the clergyman shall be ready to do the last duty when he shall be called upon to read, "Order for the Burial of the Dead, which he shall use as prescribed in the Book of Common Prayer, as far as circumstances will permit that order to be observable by the clergy of this Church." The Canon 38 of 1863 is in these terms, "At the Burial of the Dead the rubrical directions of the Book of Common Prayer shall be complied with so far as the circumstances of this Church will permit."

It thus appears, with respect to all the particulars in which the Appellant complains of the burthen laid upon his conscience by imposing upon him the necessity of using the Book of Common Prayer, that in the case of the Order for the Visitation of the Sick he has the same liberty which he before enjoyed; and with respect to the Offices of Baptism and the Burial of the Dead he was already bound by his subscription to the Canons of 1838.

I think that I ought not to trespass upon your Lordships with any

observations as to the canon permitting a bishop under special circumstances to open a mission in any part of the diocese. It is not a case in which conscience is involved, and no attempt has been made to interfere with the Appellant's ministry over the congregation at *Burntisland*.

I will only add one word as to the petitory conclusion for damages for the refusal of a license to Mr. *Wilkinson*. If the bishop had authority to grant or refuse a license at his discretion of course no valid cause of complaint arises. But if he wrongfully refused he would be personally answerable for his own act, and the General Synod cannot be liable for it in any way. And if a license was improperly withheld, it would be Mr. *Wilkinson* who would have a right to complain, and not the Appellant for the remote consequences of suffering health and mental anxiety resulting from his not obtaining a curate.

I have gone, perhaps at too much length, into the whole case, but as the Appellant has pressed it so earnestly and so anxiously on your Lordships' attention I was unwilling to leave any part of it unexamined.

I therefore submit to your Lordships that the interlocutor must be affirmed and the appeal dismissed, and I regret to add, that it must be dismissed with costs.

LORD CRANWORTH:—

My Lords, the decision of this case depends on certain well-established principles of law.

Save for the due disposal and administration of property, there is no authority in the Courts either of *England* or *Scotland* to take cognizance of the rules of a voluntary society entered into merely for the regulation of its own affairs.

If funds are settled to be disposed of amongst members of a voluntary association according to their rules and regulations, the Court must necessarily take cognizance of those rules and regulations for the purpose of satisfying itself as to who is entitled to the funds. So, likewise, if the rules of a religious association prescribe who shall be entitled to occupy a house, or to have the use of a chapel or other building.

This is the principle on which the Courts have administered

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funds held in trust for dissenting bodies. There is no direct power in the Courts to decide whether *A.* or *B.* holds a particular station according to the rules of a voluntary association. But if a fund held in trust has to be paid over to the person who, according to the rules of the society, fills that character, then the Court must make itself master of the questions necessary to enable it to decide whether *A.* or *B.* is the party so entitled.

These considerations go to the root of the present case. The Appellant contends that he was ordained under the Canons of 1838, and, so ordained, was entitled to exercise the functions of a clergyman of the Episcopal Church of *Scotland* according to the doctrine and practice established by those canons. And he complains that the effect of the Canons of 1863 has been to impose on him the maintenance of doctrines and the adoption of a practice different from those to which he bound himself on his ordination under the prior canons. But assuming that to be so, assuming that the General Synod of 1863 had no power, according to the constitution of 1838, to make the alterations of which the Appellant complains, that of itself gives no jurisdiction to the Superior Courts. There is no jurisdiction in the Court of Session to reduce the rules of a voluntary society, or, indeed, to inquire into them at all, except so far as may be necessary for some collateral purpose. The only remedy which the member of a voluntary association has, when he is dissatisfied with the proceedings of the body with which he is connected, is to withdraw from it. If, connected with any office in a voluntary association, there is the right to the enjoyment of any pecuniary benefit, including under that term the right to the use of a house or land, or a chapel, or a school, then, incidentally, the Court may have imposed on it the duty of inquiring as to the regularity of the proceedings affecting the *status* in the society of any individual member of it. But here there is no question of that sort.

This seems to me to dispose of the whole case; for I cannot think that the statements of the Appellant allege the violation of any legal right which enabled the Court of Session to inquire into the power of the General Synod to frame the Canons of 1863. The Appellant states that, as minister at *Burntisland*, he is in receipt of an income of £40 per annum, besides an annual grant

of £10 from the *Church Society* towards the maintenance of a school. This may all be true, but there is no allegation that he is entitled, as of right, to this income, or that there is any intention on the part of those from whom it is derived to deprive him of it under the provisions of the New Canons. He states that he is a member of a friendly society to which none but clergy of the Scotch Episcopal Church can belong, and he complains that if he is deprived of his *status* as a clergyman of the Scotch Episcopal Church he will lose all benefits from the premiums which he has paid since his ordination in 1848. But here, again, there is no allegation of an intention to deprive him of his *status* as a clergyman; and if there were, it is not that *status* which entitles him to the benefits of the friendly society, but a contract into which he has voluntarily entered with that body. If any rights which he or his representatives may have acquired, or may acquire, under that contract, should be violated or withheld, he will seek, and no doubt will obtain, proper redress. But until such a question arises there is no power to pass any judgment on the validity of the canons of which the Appellant complains. They are the mere rules which a voluntary association has prescribed for itself.

In the view I have taken of this question I do not feel myself in strictness called on to go any further; but the Appellant has argued his case with so much earnestness and ability that I have felt it due to him that I should shortly examine the case from his own point of view, that is, that I should consider whether, assuming that there is any power in the Court to reduce the Canons of 1863, he has shewn any ground for such reduction. I am of opinion that he has not.

The Appellant rests his case on the analogy which he supposes to exist between the body associated as the Scotch Episcopal Church and an ordinary commercial partnership. He contends, truly, that, unless so far as the articles of partnership authorize it, no change can be made in its provisions by the mere will of a majority of the partners, nor, indeed, without the concurrence of every individual of whom the partnership is composed. And he contends that on the same principles the Synod, or general assembly of persons associated as a church or religious body, can have no power to alter the canons or rules of that church or religious

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body without the consent of every member of it, except so far as they are expressly authorized to do so by the terms of their constitution. But the Synod of a Church seems to me to resemble rather the Legislature of a State than the articles of association of a partnership. A religious body, whether connected with the state or not, forms an *imperium in imperio*, of which the Synod is the supreme body, when there is not, as there is in the Church of England, a temporal head. If this is so, I feel it impossible to say that any canons which they establish can be treated as being *ultrà vires*. The authority of the Synod is supreme. It may indeed be that a Synod, or general assembly, of a religious body has no power to affect civil rights already acquired under existing canons or rules. But that is very different from saying that the canons or rules themselves have no force among those who have no such complaint to make.

This is my view of the principles involved in this case, but I think it right to add that, even on the narrower ground on which the Appellant has proceeded, I think he fails to establish any ground of complaint against the New Canons. The most material complaint relates to Articles 2 and 4 of the 30th Canon of the New Code. The Appellant complains that these two articles of this canon effect very generally a substitution of the English for the Scotch Communion Service. I will assume that they do so; but I cannot think that this affords any ground of complaint to the Appellant.

The language of the 21st of the Old Canons, when fairly interpreted, treats the old Communion Service as merely a form ordained by man's authority, and recognises in the fullest way the right of the Synod to vary the form as may be desirable. The language of that canon seems to admit of no other construction. It begins by reciting that

> Every particular church hath authority to ordain, change, and abolish ceremonies or rites of the church ordained only by man's authority.

Then the 21st of the Old Canons proceeds to say that—

> The Episcopal Church in *Scotland*, availing herself of this inherent right, hath long adopted and very generally used a form for the celebration of the Holy Communion known by the name of the Scotch Communion Office, which form hath been justly considered, and is hereby considered, as the authorized service of the Episcopal Church in the administration of that sacrament.

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But it then goes on to say that the English Office ought to be retained where it had theretofore been in use, and that no substitution of the one for the other shall be admitted unless approved by the bishop; and it declares that the Scotch Communion Office shall be held of primary authority, and that it shall be used in all consecrations of bishops and at the opening of General Synods.

I find it impossible not to deduce from the terms of this canon that the framers of the Canons of 1838 treated the Scotch Communion Office as a ceremony or rite of the Church ordained by man's authority, and liable to be changed by the same authority. The language appears to me to admit of no other construction; and if this be so, how can the Appellant complain that a subsequent Synod has, by the 30th Canon, reversed, as it were, the position of the two offices, and made the English the office of primary authority instead of the Scotch? It is to be observed, if that be important, that this canon has no direct effect on the Appellant. He is left at liberty to use the Scotch Office as he has hitherto done, and so may any new congregation on its formation if the majority desires it.

I cannot conceive anything more fairly to be treated within the competence of the General Synod than such a change of what the 21st Canon of 1838 describes as a ceremony or rite of the Church ordained by man's authority, and the power to make which change the canon itself treats as the inherent right of the Episcopal Church in Scotland.

The next canon in point of importance of which complaint is made, is the 29th, which makes the Book of Common Prayer the Service Book of the Scotch Episcopal Church for all purposes. Under the Old Canons (Canon 28), as in the New Canon 29, the Book of Common Prayer was alone to be used in the celebration of morning and evening service; but the Appellant complains that the 29th Canon makes the use of it compulsory, not only in the reading of the ordinary morning and evening services, but also in the occasional services, particularly in the Baptismal and Burial Services and in the Visitation of the Sick; and this he complains of as a grievance. But I can discover none. As to baptism, the 17th Old Canon prescribes the form to be adopted in baptism, and evidently intended that the form prescribed by the Book of

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Common Prayer should be generally used. When any applicant for baptism expresses a doubt as to the validity of baptism previously obtained from some other sect, this canon directs the form prescribed by the Book of Common Prayer in a nearly similar case to be used, and this is said to have been provided for in consequence of the unhappy multiplicity of religious sects prevailing in *Scotland*. This, however, cannot be treated as a substantial deviation from the form in the Book of Common Prayer. It was certainly in the power of the Synod to prescribe the use generally of that which was already in common, if not universal, use.

As to the Burial Service, the Appellant's objection is plainly unfounded. By the Old Canon 23, he was bound to read the Church Service for the Burial of the Dead when called on so to do. The Appellant says that this left him at liberty to use any service which he might prefer when not so called on. I desire not to be taken as at once assenting to this construction of the Old Canon; but even if that be its true interpretation, the Appellant cannot complain of the change introduced by the New Canon. It only obliges him to use the Church form on all occasions, instead of leaving him at liberty to use a different form when not required to follow the form found in the Book of Common Prayer. Under the Old Canons he was bound sometimes to use the Church Burial Service. Now he is bound always to use it. This change was certainly within the competency of the Synod. In both the Old and the New Canons exceptions are made when and so far as the circumstances of the Scotch Church make a change of form necessary.

As to the Form for the Visitation of the Sick, there is no pretence for any complaint. It is true that the general introduction by the 29th Canon of the Book of Common Prayer would introduce, as part of the services to which the Appellant must adhere, the Order for the Visitation of the Sick. But this is expressly qualified afterwards by the 38th Canon, which authorizes the Clergyman to give comfort and instruction, either according to the Order for the Visitation of the Sick, or in any other way which he may think most needful and convenient. This differs in no respect from the previous regulations contained in the 23rd Canon of 1838.

The complaint as to the 3rd Article of the 38th Canon relates to

the necessity of attending to the rubrical directions of the Book of Common Prayer at the Burial of the Dead. This head of complaint I have already dealt with.

A fourth head of complaint is founded on the 4th Article of the 20th New Canon, which enables a bishop under special circumstances to open a mission in any part of his diocese when it may seem to him desirable. To this I can only say that such a provision may be highly convenient for a church in the position of the Episcopal Church of *Scotland*. It is vain to say that no such course could be taken in the Established Church of *England*. The circumstances of the two Churches are entirely different, and I cannot imagine any reason why the Synod should not be at liberty to make this arrangement if it appeared to them desirable.

The only other part of the New Canons of which the Appellant seeks reduction is the 20th Article of the 28th Canon, which declares that the General Synod shall have power to alter, amend, and abrogate canons in force, and to enact new canons, provided that such alterations, amendments, abrogations, and new canons be in conformity with the recognised constitution of this, that is, the Scotch Episcopal Church. The same power is found in the 33rd Canon of 1838, except that there the alterations, amendments, abrogations, and new canons are required to be in conformity with the recognised constitution and "*acknowledged practice*" of the Scotch Church. The Appellant argues that the omission of these words "*acknowledged practice*" vitiates the New Canon as giving to it a force which the Old Canon did not possess. I do not feel any force in this objection. The remarks which I have already made on what I conceived to be the general power inherent in a Synod are sufficient to shew my doubt whether one Synod can validly control the power of another which is in the nature of an independent legislature. But even supposing this could be done, and supposing, further, that these words amounted, which, however, they do not, to a prohibition on the Synod against altering, by virtue of its inherent power, the acknowledged practice of the Church, and not merely to a restriction of the power conferred by the 33rd Canon, still I think the subsequent Synod was entitled to say that these words were necessarily included in the other words "recognised constitution," and so to reject them as

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inconvenient surplusage. Nothing can be described or imagined as constituting the acknowledged practice of the Church which would not also be properly described as part of its recognised constitution.

This exhausts all the parts of the New Canons of which the Appellant seeks reduction. To state shortly, therefore, my view of the whole case, I am of opinion, first, that the canons made from time to time by Synods of the Episcopal Church of *Scotland* are to be treated merely as the rules of a voluntary society over which the Court of Session has no jurisdiction, except in cases where the interpretation of them is necessary for a collateral purpose, as for determining the rights to trust property depending on their construction; secondly, that no such questions of right are raised on this record; and, thirdly, that even if the validity of the New Canons had been properly before the Court, the Appellant has not shewn any valid ground of complaint.

I concur, therefore, with my noble and learned friend in thinking that the appeal ought therefore to be dismissed.

LORD COLONSAY:—

My Lords, I so entirely concur in the views which have been stated, that I have scarcely anything to add.

A Court of Law will not interfere with the rules of a voluntary association unless to protect some civil right or interest which is said to be infringed by their operation. Least of all will it enter into questions of disputed doctrine, when not necessary to do so in reference to civil interests.

In the present case no objection is taken to the jurisdiction of the Court, for the plain reason that the Appellant has, by the shape of his action, coupled with his allegations against the proceedings of the Synod, as affecting his civil rights and interests, entitled himself to have the judgment of the Court on those civil rights and interests, and the conclusion for reduction which this summons contains was not an inept conclusion in reference to such a demand; because it might have been pleaded against a mere petitory action that those rules stood in the way, and that until they were set aside it was incompetent to the Court to go into the question, which would have been raised by a petitory action. The meaning of that part of the summons which seeks for reduction

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therefore, is, that in so far as those rules can be pleaded against the demand for redress in reference to his civil interests, they are complained of and assailed by the summons. But if the Appellant has not made out a case which the Court can maintain in the way he asks it to do in reference to the civil rights and interests said to be involved, then I apprehend that his case must fail.

His demand rests entirely on the allegation that he is exposed to pecuniary consequences in respect of the position in which he is placed with reference to the refusal of a license to his curate. That is a question which may yet have to be tried between him and his curate, if either of them fails to fulfil the contract which has been entered into between them. But at present we cannot go into that question. It is not a matter which is properly raised here, and therefore I apprehend there is no relevancy in this action as regards that demand, and there being no relevancy in this action as regards that demand, I apprehend that we cannot go into those further questions of reduction and declaration which are made, as it were, the prelude to dealing with that petitory conclusion.

If we were to go into those questions, I think that the conclusion which has been arrived at by my noble and learned friends who have already addressed the House, is irresistible. The whole case of the Appellant rests upon this, that the Synod had no power to do what they have done, and that they had no power to do so, because by the 33rd Canon of the Code of 1838 there was a prohibition against the alteration of anything which was according to the recognised or established practice. The whole case of the Appellant is, that the Canons of 1863 were *ultrà vires* of the Synod, because the Synod was restrained by that clause in the Canons of 1838.

Now the canons of this Church are, according to the recital in the Canons of 1838, matters applicable to the discipline of the Church, which it is declared that the Church has power to alter from time to time; and the recital of the Canons of 1838 bears that the Church has from time to time altered and repealed some of those canons. There must be some supreme authority, and, looking at the power of the Synod in the mode in which my noble and learned friend who last addressed the House put it, I think the Synod, which is the supreme authority in this Church,

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had the power to regulate and change those matters ordained (as the canon expresses it) by man's authority, which the recital of the Canon of 1838 declares that every church has power to regulate and change. I cannot, therefore, hold that it was *ultrà vires* of the Synod of 1863 to make that alteration.

If, my Lords, we were to go into the particulars of the alterations that have been made, I cannot say that I differ from the observations that have been made to your Lordships. It does not appear to me that there is any great infringement made upon any position which the present Appellant occupies by the New Canons of 1863. The use of the English Communion Service does not appear to me to be a matter of novelty in this Church. On the contrary, the Canons of 1838 recognise it. They allow the two modes, the two services; but, although they allow the two services, it is not to be inferred that these are two things which are incompatible in the estimation of the Church. On the contrary, it is repugnant to reason to hold that these two services are incompatible, or that the doctrines discovered now to be contained in them are things which were regarded by the Church as incompatible with each other. It could not have been a united Church or union of Churches if it were so; such a thing would be a contradiction in terms. These canons which are now complained of do nothing more than substitute the more comprehensive Communion Service of the English Church for the Communion Service of the Episcopal Church of *Scotland*, a thing which, as it appears to me from the recital of these Canons of 1838, it was perfectly within their power to do. Therefore I entirely concur in the proposition which has been made that this judgment should be affirmed.

*Interlocutors affirmed, and appeal dismissed with costs.*

Solicitor for the Appellant: *William Robertson.*
Solicitor for the Respondent: *Connell & Hope.*

END OF VOL. I.

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**DECLARATOR**—*Its Power and its Utility in determining a Right of Way.*] *Per* Lord *Colonsay*: My opinion is, that when an action of declarator to establish a right of way is fully and fairly tried, the verdict and the judgment, on becoming final, conclusively settle the question at issue as regards the public.—*Per* Lord *Romilly*: According to the English law, no party would be precluded by a prior judgment. But in the action of declarator which obtains in *Scotland* (a very desirable one), the whole question of right may be gone into; and if the Court comes to judicial decision, I am by no means prepared to say that it will not bind all. JENKINS *v.* ROBERTSON - - - 177

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2. —— *Presumption in their favour.*] A decree, to all appearance just in itself when pronounced, and strengthened, moreover, by constant possession and unvarying recognition for more than two centuries:—*Held*, to require the strongest grounds to warrant its impeachment,—the great principle applicable to such a case being *Omnia præsumuntur a judice rite et solennitur acta*.—This principle was deemed peculiarly imperative in a case where the decree in question, with its warrant and register, was shewn to have perished in a great fire so far back as 1700—nothing remaining but an extract. LEE *et al. v.* JOHNSTONE - - - - - 426

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**DOMICIL**—*Political and Civil Status—Allegiance distinguished from Domicil.*] Every individual at his birth becomes the subject of some particular country by the tie of natural allegiance, which fixes his *political status;* and becomes subject to the law of the domicil, which determines his *civil status.*—*Per* Lord *Westbury:* To suppose that for a change of domicil there must be a change of natural allegiance is to confound the political and the civil *status*, and to destroy the distinction between *patria* and *domicilium.*—*Per* The Lord Chancellor [Lord *Hatherley*]: A man may change his domicil as often as he pleases, but not his allegiance. *Exuere patriam* is beyond his power. *Dictum* of Lord *Kingsdown* in *Moorhouse* v. *Lord* (10 H. L. C. 272) qualified.—*Per* Lord *Westbury:* It is a settled principle that no man shall be without a domicil; and to secure this end the law attributes to every individual as soon as he is born the domicil of his father if the child be legitimate, and the domicil of his mother if the child be illegitimate. This is called the domicil of origin, and is involuntary. It is the creation of law—not of the party. It may be extinguished by act of law, as, for example, by sentence of death or exile for life, which puts an end to the *status civilis* of the criminal; but it cannot be destroyed by the will and act of the party.—Domicil of choice is the creation of the party. When a domicil of choice is acquired the domicil of origin is in abeyance; but is not absolutely extinguished or obliterated.—When a domicil of choice is abandoned, the domicil of origin revives,—a special intention to revert to it being unnecessary.—*Per* Lord *Chelmsford: Story* says that the moment a foreign domicil is abandoned, the native domicil is re-acquired. The word "re-acquired" is an inaccurate expression. The meaning is, that the abandonment of an acquired domicil *ipso facto* restores the domicil of origin.—If after having acquired a domicil of choice a man abandons it and travels in search of another domicil of choice, the domicil of origin comes instantly into action and continues until a second domicil of choice has been acquired.—*Per* Lord *Westbury:* A natural-born Englishman may domicile himself in *Holland;* but if he breaks up his establishment there and quits *Holland*, declaring that he will never return, it is absurd to suppose that his Dutch domicil clings to him until he has set up his tabernacle elsewhere.—*Per* the Lord Chancellor: The *status* of the child, with respect to its capacity to be legitimated by the subsequent marriage of its parents, depends wholly on the *status* of the putative father, not on that of the mother.—According to English law—where at the time of a bastard's birth the father has his domicil in *England*—no subsequent change of domicil can render practicable the bastard's legitimation. Udny *v.* Udny **441**

**2.** —— *Domicil of Birth or Origin—Its Adherence and Tenacity.*] *Per* The Lord Chancellor [*Cairns*]: The law is, beyond all doubt, clear with regard to the domicil of birth, that the personal *status* indicated by that term clings and adheres to the subject of it until an actual change is made by which the personal *status* of another domicil is acquired.—*Per* Lord *Westbury:* The domicil of origin adheres until a new domicil is acquired.—*Per* Lord *Chelmsford:* The onus of proving a change of domicil is on the party who alleges it. Bell *v.* Kennedy - - - - **307**

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**2.** —— *Alienation distinguished from Alteration of the Order of Succession.*] Alienation is a destruction of the succession rather than an alteration of its course. It removes the subject alienated from the operation of the tailzie, and leaves it as if no tailzie existed.—A deed, however, may in form partake of the character of an alienation, and yet not cease on that account to be a deed altering the order of succession. Lindsey *v.* Oswald - - - - **99**

**3.** —— *Devolution or Shifting Clause in an Unrecorded Entail.*] A shifting clause binds the heir, though the entail be not recorded, and it binds his creditors if they have had notice of it.—Such notice will be sufficient if the shifting clause is set out in the record of seisins.—The heir of entail in possession in such a case will be deemed a trustee for those entitled under the shifting clause; more especially where the clause requires the heir in possession instantly to denude, and he fails to do so.—An obligation to do an act with respect to property creates a trust;

**ENTAIL**—*continued.*
and if the party who is subject to the obligation acquires or retains, by means of his neglect of duty, a greater interest than he would otherwise have had,—he becomes a trustee of such excess for the benefit of those who would have been entitled to it if the obligation had been duly fulfilled.—*Per* Lord *Westbury:* The doctrine of trusts has the same origin, and rests on the same principles in Scotch and in English law; and it should be developed to the same extent in both systems of jurisprudence. FLEEMING *v.* HOWDEN [372

4. —— *Entail of a Pro Indiviso Share.*] *Per* The Lord Chancellor [*Hatherley*]: An estate in tail may properly be created under the Act of 1685, in a share held *pro indiviso* of land.—*Per* Lord *Colonsay:* Holding that an estate possessed *pro indiviso* is within the ordinary meaning of the Act of 1685, upon what authority is it described as incapable of being entailed? I know of none.—An entail of lands held *pro indiviso* is not disturbed by the subsequent division and allocation of the property. —*Per* Lord *Colonsay:* The contingency of subsequent division is no objection; and when the division takes place it is not necessary that there shall be dispositions by the several parties to each other. I hold that to be clear. The feudal right remains on the original infeftment, just as it did before the division.—The partition ascertains and delineates the boundaries. It does not change the land which forms the subject matter of the entail.—*Per* The Lord Chancellor: The Appellant contends that new deeds were necessary on the division of the property. But after the division the lands are not different. The Sheriff simply delivers to each owner his own share by his own title; and it requires no concurrence on the part of the other owner, by way of deed or instrument, to effectuate the transaction.—*Per* The Lord Chancellor: It struck me at one time that there might be something in the argument that the register did not after division give notice of the title on which the whole is held; but I think that all parties concerned, having notice of the entail of the moiety held *pro indiviso*, must be taken to know that such moiety was subject to the law which renders the whole property divisible; and, therefore, that an entire separate interest may be at any time allocated out of the whole to the heir in tail.—Commentaries by the Law Peers, concurring with the Court below, to the effect that the words used in the prohibitory, irritant, and resolutive clauses of an entail were, upon a reasonable construction, sufficient to satisfy the requirements of the Act of 1685. HOWDEN *v.* ROCHEID - - - - - - 550

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**GRADE**, difference of, in the question as to injury by a *collaborateur*: *See* INJURY BY FELLOW WORKMAN.

**HABIT AND REPUTE**: *See* MARRIAGE. 1.

**HARBOURS AND DOCKS**—Liability of, to poor-rate: *See* POOR-RATE. 1.

**HEIR APPARENT**: *See* SUCCESSION DUTY.

**HEIR OF ENTAIL**: *See* IMPROVEMENTS BY HEIR OF ENTAIL.

**HEIR AND EXECUTOR** — *Costs.*] How far an executor is entitled to be relieved from costs incurred by him in resisting the demands of creditors, the testator having made his debts "due at his death," a charge upon his real estate, and having also declared that they should "in no ways affect or diminish" his personal property.—Circumstances under which the House decided that such costs ought not to be allowed to an executor,—Lord *Kingsdown* dissenting.—Opinions of The Lord Chancellor [*Cranworth*], of Lord *Chelmsford*, and of Lord *Kingsdown*. LOVAT *v.* FRASER - - - - - - - 24

**IMPROVEMENT BY HEIR OF ENTAIL**—*Montgomery and Rutherford Statutes—Finality of the Decree under the Montgomery Statute.*] The decree in the action of declarator calling as Defender the next collateral heir is final, and bars all subsequent resistance. *Per* The Lord Chancellor [*Cairns*]: Parliament conceived that the maker of the improvements would protect his own issue, and that the collateral heirs would be sufficiently guarded by calling the first of them—those coming after having liberty to intervene.—*Per* Lord *Westbury:* The decree is final against the issue of the collateral heir called, in the same manner as it is final against the improver's own issue.—The decree must shew with reasonable certainty that the improvements are truly within the meaning of the statute.—*Held* (reversing the decree below), that where the improving heir had obtained and exercised authority under the *Rutherford Statute*, he abandoned all remedies under the *Montgomery Statute*.—If an heir of entail makes improvements

**IMPROVEMENT BY HEIR OF ENTAIL**—*contd.*
on the estate with a view to charge the heirs succeeding him, he must annually, within four months of the term of Martinmas, and while the improvements are in progress, lodge in the sheriff's office an account, with vouchers, of the sums expended by him; and such account must be signed by him.—But where the improving heir had died four days before the term of Martinmas, and where, consequently, his signature was impossible:—*Held*, that the signature of his executor, or personal representative, was, under the circumstances, sufficient. Campbell *v.* Earl of Dalhousie - - - - - - 259

**INJURY BY FELLOW WORKMAN, OR COLLABORATEUR**—*Difference of Grade—Master's Immunity—Principle of the Doctrine.*] *Per* The Lord Chancellor [*Cairns*]: I do not think the liability, or non-liability, of the master to his workmen can depend upon the question whether the author of the accident is not, or is, in any technical sense, the fellow-workman, or *collaborateur*, of the sufferer.—*Per* Lord *Colonsay*: "Fellow-workman" and "*collaborateur*" are not expressions well suited to indicate the relation on which the liability or non-liability of a master depends, especially with reference to the great systems of organization that now exist. And these expressions, if taken in a strict or limited sense, are calculated to mislead. The same may be said of such words as "foreman," or "manager." We must look to the functions the party discharges, and his position in the organism of the force employed, and of which he forms a constituent part. Nor is it of any consequence that the position he occupies in such organism implies some special authority, or duty, or charge.—*Per* Lord *Cranworth*: Workmen do not cease to be fellow-workmen because they are not all equal in point of station or authority.—*Per* Lord *Chelmsford*: It has certainly been held by Scotch Judges of great eminence that the exoneration of a master from liability for injury arising to one fellow-servant from the negligence of another does not take place where the servant occasioning the injury is placed in superintendence, control, or authority over the others. But the subsequent English cases have clearly established that there is no such distinction.—*Per* The Lord Chancellor: The master has not contracted or undertaken to execute in person the work connected with his business. The result of an obligation on the master personally to execute the work connected with his business, in place of being beneficial, might be disastrous to his servants, for the master might be incompetent personally to perform the work. At all events, a servant may choose for himself between serving a master who does, and a master who does not, attend in person to his business. But what the master is, in my opinion, bound to his servant to do, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work. When he has done this he has, in my opinion, done all that he is bound to do. And if the persons so selected are guilty of negligence this is not the negligence of the master; and if an accident occurs to a workman to-day in consequence of the negligence of another workman, skilful and competent, who was formerly, but is no longer in the employment of the master, the master is, in my opinion, not liable, although the two workmen cannot technically be described as fellow-workmen.—*Per* Lord *Colonsay*: Culpable negligence in supervision, if the master takes the supervision on himself;—or, where he devolves it on others, the heedless selection of unskilful or incompetent persons for the duty, or the failure to provide or supply the means of providing proper machinery or materials;—may furnish grounds of liability; and there may be other duties, varying according to the nature of the employment, wherein, if the master fails, he may be responsible.—23 & 24 Vict. c. 151 (1860), "An Act for the Regulation and Inspection of Mines." Commentary by Lord *Chelmsford*. Wilson *v.* Merry - - 326

**INTERLOCUTORY ORDER**: *See* Practice. 1, 6.

**IRRELEVANCY OF ALLEGATIONS**: *See* Joint Stock Company.

**IRRITANT CLAUSE**: *See* Entail. 1.

—— Construction: *See* Entail. 4.

**ISSUES FOR TRIAL.**] Where issues, though prolix and untechnical, have been the means of ascertaining the real justice of a case, they will not be displaced or disturbed on appeal.—Remarks by the Lord Chancellor [*Cairns*] shewing the facilities which exist in *England* for such amendments. Macfarlane *v.* Taylor - - 245

—— *See* Practice. 3.

**JOINT STOCK COMPANY**—*Sharetaking Contract—Fraud—Irrelevancy of the Allegations—Doctrine as to Companies, Directors, and Managers.*] Suit to rescind a sharetaking contract, and for *restitutio in integrum*, or, alternatively, for damages:—*Held*, under the circumstances, unsustainable.—*Per* The Lord Chancellor [*Chelmsford*]:—Notwithstanding numerous irreconcilable decisions, the true doctrine seems to be, that where a person has been drawn into a contract to purchase shares by the fraudulent misrepresentations of directors, and where the directors, in the name of the company, seek to enforce that contract, or where the person who has been deceived institutes a suit to rescind it,—the misrepresentations are imputable to the company, and the purchaser cannot be held to his contract.—*Per* The Lord Chancellor: If an untrue statement is made, founded on a belief destitute of all reasonable grounds, or which the least inquiry would immediately have corrected, it may fairly and correctly be characterised as misrepresentation and deceit.—*Per* The Lord Chancellor: If the directors employed the manager to make false representations as to the stability of the company, the effect would have been the same as if made by the directors themselves.—*Per* The Lord Chancellor: I entertain considerable doubt whether the Pursuer in this case has connected the directors sufficiently with the alleged misrepresentations to make them imputable to the company. That the directors knew of the manager's endeavours to get the pursuer to take shares is nowhere alleged; nor is it alleged that the manager gave authority to the local agent from whom the misrepresentations were immediately

**JOINT STOCK COMPANY**—*continued.*

derived.—*Per* Lord *Cranworth:* The Court below framed issues for a jury trial; but I think no such trial was necessary, because no relevant case was stated. —*Per* The Lord Chancellor: No issues ought to have been directed.—*Per* The Lord Chancellor: A company cannot retain any benefit which they have gained through the fraud of their agents. —*Per* Lord *Cranworth:* Corporate bodies may be made responsible for the frauds of agents, to the extent to which they have profited by such frauds.—*Per* The Lord Chancellor: If, instead of seeking to set aside the contract, the person defrauded prefers an action of damages for the deceit, such action cannot be maintained against the company, but only against the directors.—*Per* Lord *Cranworth:* An incorporated company cannot, in its corporate character, be called on to answer in an action for deceit.—*Per* Lord *Cranworth: Restitutio in integrum* can be had only where the party seeking it is able to put those against whom it is asked in the same situation as that in which they stood when the contract was entered into.—*Per* The Lord Chancellor: Whether the change of a company from unincorporate into corporate, for the mere purpose of more conveniently winding up its affairs, renders *restitutio in integrum* impracticable, is a question which, if it were necessary to determine, I should wish to consider more carefully.—*Per* Lord *Cranworth:* The incorporated company cannot be sued for frauds committed by directors before the incorporation.—*Per* The Lord Chancellor: That the complainant was himself a member of the company whose agents had committed the fraud, would not be a valid objection to his suit for redress; nor would it be an answer that his suit might prejudice those who had innocently acquired their shares after *he* had acquired *his.* Western Bank of Scotland *v.* Addie - 145

**JURISDICTION,** Witnesses out of: *See* Testimony, Perpetuation of.

—— *See* Practice. 3.

**JURY**—*Trial by, as of right.*] *Per* Lord *Chelmsford:* It was clearly in the discretion of the Judge Ordinary to decide whether the trial of the Appellants' Petition should be by a jury or before himself, either alone or with other Judges of the Court. And the Appellants had no right to insist upon having a jury.—*Per* The Lord Chancellor: In the case of an heir-at-law who has been disinherited, he has, on the issue *devisavit vel non,* a right to a trial by jury. But in no other case is there such a right. Shedden *v.* Patrick - - - - - 471

—— Case of account: *See* Practice. 7.

**JUS ACCRESCENDI.**] The doctrine of the Roman law as to *jus accrescendi* is subtle and obscure; it is but little used in *Scotland.*—Where a fee is provided to a class, the question whether on the death of one of the class, his share shall go to the survivors or to his own representatives, is always a *questio voluntatis.*—It would seem that the omission of an express accrescing clause will go far to exclude accretion. Carlton *v.* Thompson 232

**LAPSLEY v. GRIERSON** (1 H. L. C. 498)—Comments by the Law Peers on.] Campbell *v.* Campbell - - - 182

**LEASE UNDER THE MONTGOMERY ACT**—*Statutory Nullity.*] The *Montgomery Act* (10 Geo. 3, c. 51), in order to encourage the formation of villages and the erection of houses on entailed estates in *Scotland,* authorized the owners of such estates to grant leases for ninety-nine years, of not more than five acres to each individual, such leases to be void if one dwelling-house of the value of £10 should not be built for each half-acre within ten years from the dates of such leases:—*Held* by the House (affirming the judgment of the Lord Ordinary and of the Inner House), that where a lessee under the *Montgomery Act* had failed to erect within the prescribed period the dwelling-houses required by the Act, the case was not one of mere irritancy, which might be cured, but of statutory nullity, annihilating the lease.—A lease under the *Montgomery Act* was granted for the erection of a powder magazine.—Whether this lease, on the policy of the statute, was void *ab initio,* the Law Peers did not determine; but they were clear in their opinion that inasmuch as the lessee, the erector of the powder magazine, had failed, within the proper period, to build the required dwelling-houses, his lease had become absolutely void, and his offer to build, *after* the proper period, gave him, under the circumstances, no claim to equitable relief or consideration.—A letter from the lessor to the lessee, dispensing with the condition as to building the required dwelling-houses:—*Held,* to impose no obligation on the subsequent heir of entail. Carrick *v.* Miller - - - - 356

**LEGATEES, RESIDUARY, AND SPECIFIC LEGATEE**—*Construction.*] Contest as to ten shares in the *Carron Company,* between residuary legatees under a testamentary disposition and the executrix of a specific legatee under a codicil. Decision by the House that the shares went to the specific legatee, although, in consequence of a fraudulent concealment, the testatrix was ignorant of the real magnitude of the gift she was bestowing. —*Per* The Lord Chancellor [*Cairns*]: The codicil passed the shares with every right that was incident to them.—*Per* Lord *Cranworth:* The shares bequeathed by the codicil included everything appertaining to them.—*Per* Lord *Colonsay:* The real question is, whether the fund went to the specific legatee or to the residuary legatees. The testatrix died in ignorance of the facts. The words which she has used are not necessarily conclusive. But, upon the whole, I think that no violence is done to the will by the construction which is proposed to be put upon it:—*Held* (reversing the decree below), that the residuary legatees had no title to demand satisfaction in respect of the fraudulent concealment aforesaid, or in respect of the compensation which the executrix of the specific legatee had received for it. Carron Company *v.* Hunter - - - - - 362

**LEGITIMACY**—*Six Judgments against the Legitimacy of one Individual.*] Case in which a gentleman, the Appellant, *William Patrick Ralston Shedden,* born in *America,* but claiming by descent a Scotch estate, was, so far back as 1803, pronounced by the Court of Session *illegitimate;* in which the sentence so pronounced was, in 1808, affirmed by the House of Lords;—in which an action brought to set aside the sentence of both

**LEGITIMACY**—*continued.*
tribunals was, in 1852, dismissed by the Court of Session with costs;—in which such dismissal was, in 1854, affirmed by the House of Lords with costs;—in which a petition presented by the said Appellant and by his daughter, to have him declared not only legitimate, but also a natural-born subject of the Queen, was, by the Court for Divorce and Matrimonial Causes, in 1860, dismissed with costs;—and, finally, in which, upon appeal from the adjudication of the Court for Divorce and Matrimonial Causes, the House of Lords, on the 31st of July, 1869, affirmed it with costs.—*Per* Lord *Chelmsford*: The only question which the Court below had to determine was, whether there had been a marriage of the parents of the Appellant, *William Patrick Ralston Shedden*, prior to his birth. His claim to be declared legitimate was placed upon no other ground. For many years before the father's death, *Ann Wilson* was living with him, sitting at the head of his table, and acting in every respect as the mistress of the establishment, being visited by the respectable families in *New York*, and generally reputed to be his wife. Evidence was given by members and friends of the family of their being always reputed to be man and wife, and visited as such by respectable families in the neighbourhood. If the case of the Appellants had rested on this description of proof, without anything to oppose it, it would have been conclusive in favour of a prior marriage.—*Per* Lord *Chelmsford:* The presumption of a prior marriage arising from cohabitation and acknowledgment was completely rebutted by evidence on the other side of the strongest character. The Appellant relied originally on the marriage *after* the birth of children.—*Per* The Lord Chancellor [*Hatherley*]: If, according to the theory now set up, there had been a prior marriage, which was known to everybody, then there was not a shadow of ground for a second marriage. That second marriage, unexplained as it is, wholly cuts away the ground for any such prior marriage. Shedden *v.* Patrick - - - - 470

**LEGITIMACY AND MARRIAGE.**] *Per* the Lord Chancellor [*Chelmsford*]:—Proof of the legitimacy of the offspring is proof of the validity of the marriage. Campbell *v.* Campbell - 182

**LIABILITY TO POOR RATE**: *See* Poor Rate.

**LIFE-RENT AND FEE**: *See* Vesting.

**LORDS, HOUSE OF** — Immunity of, from poor-rate: *See* Poor-rate. 1.

**"MADE"**—Capability of the word in Scotch entail: *See* Entail. 1.

**MANAGERS**, Doctrine as to: *See* Joint Stock Company.

**MARRIAGE** — *Habit and Repute — Connection originally Illicit—Transmutation into Matrimony —Evidence.*] Cohabitation, with the required repute, as husband and wife, is proof that the parties between themselves have mutually contracted the matrimonial relation. It demonstrates that interchange of consent which alone constitutes marriage in *Scotland*. The law of habit and repute, however, is not peculiar to *Scotland;* although in countries where the facilities of matrimony are less than in *Scotland*, the evidence to

**MARRIAGE**—*continued.*
establish the marriage must be stronger.—Marriage, technically, is not constituted, but evidenced, by habit and repute, which, for that purpose, must be uniform and positive.—A connection commencing in adultery may, on ceasing to be adulterous, become matrimonial by consent, and may be evidenced by habit and repute, the parties being at liberty to intermarry.—The alteration in the character of the connection, from adultery to matrimony, need not be indicated by any public act, or by any observable change in the outward demonstration.—It is not necessary to prove the specific period when the consent was interchanged. —*Per* Lord *Westbury:* You must infer the consent to have been given at the first moment when you find the parties able to contract.—Comments by the Law Peers on *Cunningham* v. *Cunningham* (2 Dow, 483) and *Lapsley* v. *Grierson* (1 H. L. C. 498). Campbell *v.* Campbell - - 182

2. —— *Legitimacy and Marriage.*] Proof of the legitimacy of the offspring is proof of the validity of the marriage. Campbell *v.* Campbell [182

—— Evidence of, before, and after, the birth of children: *See* Legitimacy.

—— Declaration of: *See* Reference to Oath.

**MARRIAGE SETTLEMENT RENDERED NUGATORY**: *See* Power coupled with a Duty.

**MASTER AND WORKMAN** — Injury by fellow workman — Duties of the master: *See* Injury by Fellow Workman.

**MINES.**] 23 & 24 Vict. c. 151, "An Act for the Regulation and Inspection of Mines." Commentary by Lord *Chelmsford*. Wilson *v.* Merry 327

**MISCONDUCT AFTER COMPROMISE OF A DIVORCE SUIT**: *See* Divorce.

**MISCONDUCT AFTER DEED OF SEPARATION**: *See* Divorce.

**MONTGOMERY STATUTE** (10 *Geo.* 3, *c.* 51), Finality of the decree under: *See* Improvements by Heir of Entail.

—— Lease under: *See* Lease.

**MONTGOMERY AND RUTHERFORD STATUTES**, Election under: *See* Improvements by Heir of Entail.

—— Improvements under: *See* Improvements by Heir of Entail.

**NET AND COBLE**: *See* Salmon Fishings. 2.

**NOBILITY, TITLES OF, AND ROYAL PREROGATIVES**—Challenge by the Crown: *See* Claim to Royal Prerogatives.

**OATH OF PARTY**: *See* Reference to Oath.

**OCCASIONAL POOR, RELIEF OF**: *See* Poor Law.

**ONUS PROBANDI.**] The *onus probandi* in suing for the reduction of a service is on the pursuer. Alexander *v.* Officers of State for Scotland [276

—— *Per* Lord *Chelmsford*:—The *onus* of proving a change of domicil is on the party who alleges it. Bell *v.* Kennedy - - - 307

**ONUS PROBANDI**—*continued.*

—— Where encroachment on *alveus* is complained of: *See* Prescriptive Possession. Riparian Ownership.

**OWNERSHIP, ABSOLUTE**—*Conditional Substitution.*] The position of an absolute unlimited owner subject to a conditional gift over is unknown to the law of *England*, but well known to the Scotch law.—Hence in *Scotland*, although a conveyance to a man "and his heirs and assigns whomsoever" makes him an absolute owner or fiar, there may follow a valid conditional substitution or gift over to which, on the occurrence of the contemplated events, effect will be given. Barstow *v.* Black. Pattison *v.* Henderson **392**

**PARTS AND PERTINENTS**: *See* Prescriptive Possession.

**PERMANENT POOR, RELIEF OF**: *See* Poor Law.

**PERPETUATION OF TESTIMONY**: *See* Testimony, Perpetuation of.

**PERTINENTS**—Salmon fishings will not pass under the mere word "*pertinents.*" Lord Advocate *v.* Sinclair - - - - - **174**
*See* Prescriptive Possession.

**PLEADINGS AND ISSUES, AMENDMENTS OF**: *See* Amendments of Pleadings and Issues.

**POLITICAL STATUS**: *See* Domicil. 1.

**POOR LAW**—*Relief of able-bodied Persons.*] Able-bodied persons are absolutely excluded from relief out of funds raised by assessment for relief of the poor under the 8 & 9 Vict. c. 83.—The Poor Law Boards of *Scotland* have no discretionary power to grant relief to able-bodied persons, although those persons may be ready and willing to work, and are in destitution simply from the want of employment.—The right to grant, and the right to receive, relief, must co-exist, and are correlative. Jack *v.* Isdale - - **1**

**POOR-RATE**—*Immunity of the Crown—Liability of Harbours and Docks—General Liability—8 & 9 Vict. c.* 83; *23 & 24 Vict. c.* 48.] The statutes which authorize assessments for relief of the poor are silent as to the Crown:—Hence the Crown is subject to no poor-rate. To this immunity a wide signification is ascribed; for not only are the palaces of which Her Majesty is in actual occupation deemed free from assessment, but even the House of Lords is held to be exempt on the ground that it is regal.—So likewise Government offices, as the Post Office, the Horse Guards, and the Admiralty, escape this impost, simply because they are in the service of the Crown.—In the days of Lord *Mansfield*, Lord *Kenyon*, Lord *Ellenborough*, and Lord *Tenterden*, an opinion prevailed that property held for public purposes (though unconnected with the Crown, the State, or the Government), was exempt from poor-rates. This opinion was shaken by Lord *Denman*, and substantially overturned by Lord *Campbell;* but it was not finally extinguished till the judgments of the House of Lords pronounced last session in the English case of the *Mersey Docks*, and in the Scotch case of the *Clyde Navigation Trustees* v. *Adamson.* — *Per* The Lord Chancellor [*Cranworth*]: We are all agreed that the principle of the

**POOR RATE**—*continued.*

*Mersey Docks Case* and that of the *Clyde Navigation Trustees* v. *Adamson* are the same and not to be distinguished. Adjudged by the House that the *Leith Commissioners* were liable to be assessed for the relief of the poor in respect of their docks and harbours, as owners and occupiers of lands and heritages within the meaning of the statutes not for their own use, but exclusively for the benefit of the public, there being no exemption of property held for public purposes unless held by the Crown or for the Crown. Leith Harbour and Docks Commissioners *v.* Inspector of the Poor **17**

2. —— *Res Judicata.*] That the Court has decided against a poor rate for one year, is no reason why it should not decide in favour of a poor rate for another and a different year, in respect of the same property, and in a suit between the same individuals. The doctrine of *res judicata* does not apply to such a case. Leith Harbour Commissioners *v.* Inspector of Poor - **17**

3. —— *Rateability for Relief of the Poor where the Property, though Public, is unconnected with the Crown.*] The property of the *Edinburgh* University is neither held by the Crown nor for the Crown. It is therefore rateable to the relief of the poor.—*Per* Lord *Cranworth:* The ownership of this property is not in the Crown—neither is the occupancy. The University are not only the sole owners but the sole occupiers.—*Per* The Lord Chancellor [*Cairns*]: That the property of the *Edinburgh* University is dedicated to public purposes, must now be taken to be a wholly insufficient ground of exemption.—*Per* Lord *Cranworth:* With regard to the question of *value*, the receipt of the matriculation fees and of the class fees is sufficient.—The 8 & 9 Vict. c. 83, s. 37, directs that "the value shall be taken to be the rent which may be reasonably expected, one year with another." In making this estimate it is not clear that the tenant is to be regarded as precluded from using the property otherwise than as the University uses it. Greig *v.* University of Edinburgh - - - - - **348**

**POSSESSION**—*Presumption in favour of long Possession.*] *Per* Lord *Westbury:* We ought to presume everything that can be reasonably supposed in favour of long possession. I do not find that doctrine quite so prominent as I could have desired in the judgments below. Lee *et al. v.* Johnstone - - - - - - **426**
—— *See* Prescriptive Possession.

**POST-NUPTIAL SETTLEMENT**—*Husband's subsequent Bankruptcy—Wife's Claim.*] A post-nuptial settlement, in so far that it secured a separate provision for the wife during coverture, *held*, to have been voluntary and gratuitous, and to have been revoked and superseded by the husband's subsequent bankruptcy. *Per* Lord *Colonsay:* Grants by a husband to his wife, *stante matrimonio*, are revocable, unless special circumstances are established to make out an exceptional case. Dunlop *v.* Johnston - - - - **109**

**POWER COUPLED WITH A DUTY**—When a power, coupled with a duty, is conferred upon trustees, to be executed by them at a fixed period, and after they have come to a judgment as to the conduct of the individual to be affected, they can-

**POWER COUPLED WITH A DUTY**—*continued.*
not divest themselves of the power, or execute it until the time appointed; nor can they enter into any anterior compact respecting it.—The fact that the individual to be affected by the execution of the power (a youth of twenty-one), married three years before the time appointed for such execution; the fact that the trustees formally approved of the marriage, and were made aware of the settlement thereon, including a provision out of the trust estate for the intended wife; and the fact, moreover, that they gave no caution or warning, that they might ultimately be obliged to defeat it; all these facts made no difference in the result; for it was held to be the duty of the trustees (the husband having, in their judgment, subsequently misconducted himself), to execute the power so as to restrict him to a life interest, although the effect was to defeat the provision for the wife, as well as other claims founded on a confident expectation that the marriage settlement would not be disturbed. *Per* The Lord Chancellor [*Cranworth*]: Did the trustees, by consenting to the marriage, and (as I think I may assume) by consenting to the settlement, deprive themselves of this power? My clear opinion is that they did not.—*Per* Lord *Chelmsford:* All parties knew, or ought to have known, that the provisions of the settlement must depend on the conduct of the son. Weller *v.* Ker - - - 11

**PRACTICE**—*Acquiescence.*] Where a reclaiming note from a Lord Ordinary's interlocutor to the First Division had not been insisted in, and where the interlocutor was consequently allowed to stand:—*Held*, by reason of this acquiescence, that an appeal to the House of Lords was excluded. Lovat *v.* Fraser - - - 24

2. —— *Personal Bar against objecting to an Appeal.*] Where, with the acquiescence of both parties, a Judge Ordinary deviates from the *cursus curiæ*, he thenceforth ceases to act judicially, and becomes an arbitrator, subject to no appeal. But if the party against whom the Judge Ordinary—*quà* arbitrator — decides, reclaims to the Inner House, and there obtains a reversal, he is personally precluded from afterwards objecting to an appeal by his opponent to the House of Lords. Bickett *v* Morris - - - 47

3. —— *Jurisdiction — Issues — Uncertainty — Right of Way — Res Judicata — Costs.*] Where proceedings are taken out of the ordinary *cursus curiæ* with the assent of the parties, all subsequent interlocutors in the course adopted, though pronounced adversely, are in the nature of awards, and not subject to appeal.—2. Where, in an action of declarator of right of way, the defender had consented to judgment against him upon issues describing the footpath claimed as leading "by or near" a red line on a plan in process, the Court had subsequently directed an engineer to lay off the footpath so consented to "in such manner and such a line as to make the footpath least burdensome to the Defender." *Held*, 1. That the Court, by so doing, had departed from the *cursus curiæ*. 2. That all the interlocutors following on that departure were extra-judicial and not appealable. 3. That the judgment was vague and uncertain in consequence of the alternative form of the issue "by or near." 4. Affirming the judgment of the

**PRACTICE**—*continued.*
Court below, that a minute abandoning three out of five footpaths claimed in the summons, and lodged before closing the record, was irregular as a minute under the *Judicature Act;* and that it was too late to receive another minute in the same terms after closing the record, and after judgment upon the issues as to the other two footpaths had been given, although some conclusions of the summons were still undisposed of. 5. *Semble*, judgment of *absolvitor*, *quoad* the three roads, the right to which was never put in issue, would not be *res judicata* in another action to establish such right. 6. An appeal against interlocutors made after a departure from the ordinary course of the Court, dismissed without costs; the House being of opinion that the parties had been led astray by the Court below. White *v.* Duke of Buccleuch - - - - 70

4. —— *Costs—Appeals not encouraged.*] That expenses have not been awarded in the Court below, is no reason for refusing costs when the decree complained of is affirmed. To rule otherwise would but encourage litigation. Diggens *v.* Gordon - - - - - 136

5. —— At the close of the Respondent's argument, the appellant, who had opened her case in person, was told that the House would hear her counsel in reply; but if she began she must finish. The House would not allow her to break off and then hear her counsel. Longworth or Yelverton *v.* Yelverton - - - 218

6. —— *Competency of an Appeal—Interlocutory Order*—48 *Geo.* 3 *c.* 151.] When a judgment is interlocutory, when it is unanimous, when it relates to the practice of the Court below, and when leave to appeal is not granted, an appeal to the House is incompetent. Western Bank of Scotland *v.* Baird - - - - 170

7. —— *Case of Account—Jury Trial.*] Where the result depends on voluminous and complicated commercial accounts, it may often be convenient and expedient to have a preliminary report from a professional accountant before sending the case to trial before a jury. Western Bank of Scotland *v.* Baird - - - - 170

8. —— *Res Judicata.*] That the Court has decided against a poor-rate for one year, is no reason why it should not decide in favour of a poor-rate for another and a different year, in respect of the same property, and in a suit between the same individuals. The doctrine of *res judicata* does not apply to such a case. Leith Harbour Commissioners *v.* Inspector of Poor - 17

**PREROGATIVES, ROYAL, CLAIMED BY A SUBJECT**: *See* Claim to Royal Prerogatives.

**PRESCRIPTION, EXCLUSION OF BAR OF**: *See* Charitable Trust. 1.

**PRESCRIPTIVE POSSESSION UNDER THE ACT OF 1617**, *c.* 12—*Parts and Pertinents—Regalia.*] To be effectual, prescriptive possession must begin with a title, and must continue under it for forty years.—The title originally may have been infirm or invalid, but by the required possession for forty years all challenge and impeachment are excluded. —What is alleged to be "part and pertinent" must be shewn to have been possessed as belonging to the principal estate. Mere contemporaneous

**PRESCRIPTIVE POSSESSION UNDER THE ACT OF 1617**—*continued.*

occupation will not suffice.—The onus of proof is on the party who sets up the claim.—Discontiguity, *per se*, is not a bar.—The Royal Palace of *Dunfermline*, claimed by the respondent as "part and pertinent" of his Barony of *Pittencreiff*, and possessed by him for forty years, but without any initiatory grant or title:—*Held* (reversing the decree below), to be the property of Queen *Victoria* and her royal successors. Lord Advocate *v.* Hunt - - - - - - - 85

——: *See* Salmon Fishings.

**PRO INDIVISO, LANDS HELD**—Effect of subsequent division: *See* Entail. 4.

**PROHIBITORY CLAUSE**—Construction. *See* Entail. 4.

**RATEABILTY FOR THE RELIEF OF THE POOR**: *See* Poor-rate.

**REDUCTION EX CAPITE LECTI**—An heir-at-law has no title to sue a reduction *ex capite lecti* unless he can shew that, but for the deed sought to be set aside, he must succeed to the property.—An heir of substitutionary provision may sue a reduction *ex capite lecti* where he can shew that, as such heir, the deed sought to be set aside prejudices his interests. Barstow *v.* Black; Pattison *v.* Henderson - - - - 392

**REFERENCE TO OATH OF PARTY**—In *Scotland* there may be a reference to oath at any time between the closing of the record and the extracting of the decree, although every other mode of proof has been previously tried and has failed.—Even after the judgment of the House of Lords on appeal a reference to oath is competent, and continues so till extract.—Such reference, however, is matter of judicial discretion, and not to be permitted where the *status*, the rights, or the interests of third parties may be prejudiced or affected.—The true principle is, to settle the immediate question between the parties litigant, and to go no further.—A reference to oath ought not to be permitted where the response may involve an admission of criminality; for no one is bound to swear *in suam turpitudinem*.—As to whether a reference to oath is competent in a declarator of marriage, see the opinions of the Lord Chancellor [*Chelmsford*], p. 220; of Lord *Cranworth*, p. 226; and of Lord *Colonsay*, p. 227. Longworth or Yelverton *v.* Yelverton - 218

**REGALIA**: *See* Prescriptive Possession. Salmon Fishings. 1.

**RELIEF OF ABLE-BODIED PERSONS**: *See* Poor Law.

**REPUTE**: *See* Habit and Repute.

**RES JUDICATA**—That the Court has decided against a poor-rate for one year, is no reason why it should not decide in favour of a poor-rate for another and a different year, in respect of the same property, and in a suit between the same individuals. The doctrine of *res judicata* does not apply to such a case. Leith Harbour Commissioners *v.* Inspector of Poor - - 17

—— *See* Decree by Compromise. Practice. 3.

**RESIDUARY LEGATEES**: *See* Legatees.

**RESOLUTIVE CLAUSE** — Construction: *See* Entail. 4.

**RESTITUTIO IN INTEGRUM**: *See* Joint Stock Company.

**RESTITUTION, SUIT FOR, HOW REGARDED IN THE DIVORCE COURT**: *See* Divorce.

**RIPARIAN OWNERSHIP**—*Alveus of a running Stream.*] The soil of the *alveus* is not the common property of the respective owners on the opposite sides of a river; the share of each belongs to him in severalty, and extends *usque ad medium filum aquæ;* but neither is entitled to use it in such a manner as to interfere with the natural flow of the stream.—A fence or bulwark on the bank is allowable; but the *alveus* is sacred.—Any encroachment by one proprietor may be resisted by the other; and the onus of proving that the act is *not* an encroachment falls on the party doing it, who is *primâ facie* held responsible.—Mere apprehension, without some shew of injury, will not ground a complaint; but it is not necessary to obtain, or be guided by, scientific opinions.—*Per* Lord *Westbury:* This decision establishes the important principle that an encroachment on the *alveus* of a running stream may be complained of, without the necessity of proving that damage has been sustained, or is likely to be sustained. Bickett *v.* Morris - - - - 47

**RIVER**: *See* Riparian Ownership.

**ROYAL PREROGATIVE CLAIMED BY A SUBJECT**: *See* Claim to Royal Prerogative.

**RUTHERFORD STATUTE**, 11 & 12 Vict. c. 36 *See* Improvements by Heir of Entail.

**SALES OF SUPERIORITIES**: *See* Superiorities.

**SALMON FISHINGS**—*Regalia—Prescriptive Possession under the Act* 1617, *c.* 12.] Salmon fishings are *inter regalia;* they belong to the class of regalia which the Crown may give away.—A grant of "fishings," merely, is not a grant of *salmon* fishings; but a grant of "fishings" merely, if followed by the requisite endurance of possession, will establish a right of *salmon* fishing, even against the Crown; for by the positive prescription of forty years under the Act 1617, c. 12, the rights of private parties are protected against all challenge, whether regal or popular.—A party claiming a right of salmon fishings must either shew a grant of salmon fishings, or a grant of fishings generally, followed, for the requisite period, by the exercise of the right of salmon fishing. Lord Advocate *v.* Sinclair - 174

2. —— *Right of Challenge.*] It would seem that even a *primâ facie* title to fish for salmon on one side of a river will give a right of challenge against fishing for salmon on the opposite side.—An ambiguous right of fishing may, upon evidence of user, be construed to embrace a right of *fishing for salmon;* and it is a mistake to suppose that for this purpose the evidence must establish the specific user of net and coble. Stuart *v.* McBarnet - - - - - - 387

**SCHEME FOR ADMINISTERING A CHARITABLE TRUST**: *See* Charitable Trust. 1.

**SEPARATION, DEED OF**—Effect of misconduct after: *See* Divorce.

**SERVICE OF HEIR**—Right of Crown to reduce: *See* Claim to Royal Prerogative.

**SETTLEMENT, MARRIAGE**—Rendered nugatory: *See* Power coupled with a Duty.

**SETTLEMENT, POST-NUPTIAL** — Subsequent bankruptcy: *See* Post-nuptial Settlement.

**SHARETAKING CONTRACT**: *See* Joint Stock Company.

**SHIFTING CLAUSE** in an unrecorded entail: *See* Entail. 3.

**SPECIFIC LEGATEES**: *See* Legatees.

**STATE, OFFICERS OF**—*Oppressive Course taken by.*] Suspension of the civil suit: institution of criminal proceedings.—Disapprobation expressed by Lord *Chelmsford*. Alexander *v.* Officers of State for Scotland - - - - 277

**STATUTES**:

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—— 1579, c. 74 - - - - 4
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13 Eliz. c. 5 - - - - - 109
14 Eliz. c. 5 - - - - - 4
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25 & 26 Vict. c. 89 - - - - 160

**STATUTORY NULLITY**: *See* Lease under the Montgomery Act.

**SUBPŒNA DUCES TECUM**—A witness may well excuse himself for not bringing with him and producing documents which he has under trust, and the right to which is, or may become, the subject of litigation. He is not bound to search for them, if he shews that they are in a place to which access on his part is both legally and physically impossible. Campbell *v.* Earl of Dalhousie - 462

**SUBSTITUTION, CONDITIONAL**; *See* Ownership, Absolute.

**SUCCESSION DUTY**—*Heir Apparent—Beneficial Interest under the* 16 & 17 *Vict. c.* 51.] Where an apparent heir died without taking possession,—without making up a title—without drawing rent—and without incurring representation:—*Held* that the case did not come within the meaning of the statute, and that succession duty was not demandable by the Crown.—*Per* The Lord Chancellor [*Hatherley*]: The "beneficial interest" must be regarded as an interest to which the successor *has become entitled in possession.*—*Per* Lord *Westbury*: It must not be a mere apparency. Lord Advocate *v.* Stevenson - - - 411

**SUCCESSION, ORDER OF** — Alteration distinguished from alienation: *See* Entail, 2.

**SUPERIORITIES**—*Sales of, under the* 20 *Geo.* 2, *c.* 50.] *Per* Lord *Westbury*: There is an obligation and trust created by the 20 Geo. 2, c. 50, requiring that property bought with the proceeds of the sales of superiorities, shall be settled to the original uses; and this trust affects the heirs respectively succeeding to the purchased lands. Fleeming *v.* Howden - - - 372

**SURPLUSAGE**: *See* Entail. 1.

**SYNOD, ECCLESIASTICAL**—*Its Character and Authority.*] *Per* The Lord Chancellor: A General Synod of the Church duly and regularly summoned, has the undoubted power to alter, amend, and abrogate the canons in force, and to make new ones.—*Per* Lord *Cranworth*: The Synod is the supreme body where there is not (as there is in the Church of *England*) a temporal head. Forbes *v.* Eden - - - - - 569

**TACKSMAN OF TEINDS**: *See* Titular and Tacksman.

**TEIND**—*Claim on Land formerly waste, but now made productive.*] Waste land overlooked in ancient decrees for teind becomes subject to teind when rendered productive by modern cultivation.—Against the demand of a parish minister claiming teind, certain ancient decrees were produced by the heritors to shew that the lands sought to be fixed had already been charged; but as the decrees did not appear to have been exhaustive, the Court of Session (acting as a Court of Teind), ordered an inquiry, and their order was affirmed by the House:—*Held*, however, that where a decree for teind purports in terms to have valued all the lands of a parish, no question can afterwards be raised as to any of the lands which it embraces being teindable. Nicol *v.* Paul - - 127

—— : *See* Titular and Tacksman.

**TENENDAS CLAUSE**—Although this clause cannot transmit a right, it may aid in the construc-

**TENENDAS CLAUSE**—*continued.*
tion of a clause which does transmit a right. LORD ADVOCATE *v.* SINCLAIR - - - 174

**TESTIMONY, PERPETUATION OF**—*Witnesses out of the Jurisdiction.*] Proceedings under the 5 & 6 Vict. c. 69, and 22 Vict. c. 20, ought to be jealously watched.—*Per* The Lord Chancellor: It was not intended to give a party seeking to perpetuate testimony rights stronger than those which would belong to him in an actual and present litigation. CAMPBELL *v.* EARL OF DALHOUSIE - - 463

**TITULAR AND TACKSMAN OF TEINDS**—By the law of *Scotland* a person may be, at *once*, both tacksman and titular of the same teinds. LEE *et al. v.* JOHNSTONE - - - - 426

**TRIAL BY JURY AS OF RIGHT**: *See* JURY, TRIAL BY.

**TRUST CREATED BY THE 20 Geo. 2, c. 50**: *See* SUPERIORITIES, SALES OF.

**TRUST**: *See* BANKRUPTCY OF A DECEASED DEBTOR. SUPERIORITIES, SALES OF.

**TRUSTS**—Doctrine of trusts: *See* ENTAIL. 3.

**TRUSTEES, THEIR DUTY IN THE EXERCISE OF A POWER**: *See* POWER COUPLED WITH A DUTY.

**UNCERTAINTY**: *See* PRACTICE. 3.

**UNMARKETABLE ARTICLE** — Damages: *See* BREACH OF CONTRACT.

**VESTING**—*Life-Rent and Fee.*] The general rule is that the fee vests *à morte testatoris*; whether given to individuals *nominatim*, or to a class. The leaning of the law is towards vesting. Thus the postponement of the period of payment till the expiration of a life-rent does not suspend the vesting. That some members of a favoured class were unborn at the testator's death is no obstacle to the right vesting in each of them as soon as they respectively come into existence; although the amount of the benefit to each may not be then ascertainable. The *jus crediti* is in the beneficiaries as a vested right, although the *jus dominii* may be in trustees. Where a fee has vested, it passes to heirs and personal representatives, unless there be something in the language of the instrument, or in the nature of the subject, that requires a deviation. CARLTON *v.* THOMPSON - 232

**VINDICATION OF AN ANCIENT CHARITABLE TRUST**: *See* CHARITABLE TRUST. 1.

**VOLUNTARY ASSOCIATIONS** — *Their Independence.*] *Per* Lord *Cranworth*: Save for the due disposal and administration of property there is no authority in the Courts either of *England* or of *Scotland* to take cognizance of the rules of a voluntary society entered into merely for the regulation of its own affairs. But if funds are settled to be disposed of amongst members of a voluntary association, according to their rules and regulations, the Court must necessarily take cognizance of these rules and regulations, for the purpose of satisfying itself as to who is entitled to the funds. —*Per* Lord *Colonsay*: A Court of Law will not interfere with the rules of a voluntary association, unless to protect some civil right or interest which is said to be infringed by their operation. FORBES *v.* EDEN - - - - - 568

**VOLUNTARY SETTLEMENT**: *See* POST-NUPTIAL SETTLEMENT.

**WARRANTY**: *See* BREACH OF CONTRACT.

**WATERS**: *See* RIPARIAN OWNERSHIP.

**WAY, RIGHT OF**: *See* DECLARATOR. PRACTICE. 3.

**WIFE, CLAIM OF, UNDER POST-NUPTIAL SETTLEMENT**: *See* POST-NUPTIAL SETTLEMENT.

**WITNESSES OUT OF JURISDICTION**: *See* TESTIMONY, PERPETUATION OF.

**WORKMAN** — Injury by fellow workman — Duties of the master: *See* INJURY BY FELLOW WORKMAN.

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